The Madras Law Journal.

VOL. XX.] AUGUST, 1910. [PART XVI.

UNIVERSITY LIBRARY LAW COLLEGE

LEGAL PROCEEDINGS BY OR AGAINST MANAGING MEMBERS OF HINDU FAMILIES.

The question as to how far legal proceedings by or against managing members of Hindu families are binding against the other members is by no means an easy one, but it will be our endeavour in the course of this article to indicate briefly what we conceive is the result of judicial decisions on this subject.

As has been pointed out by the Privy Council in *Nanomi Babuasin* v. *Mudun Mohun*[1] care ought to be taken to distinguish this question from the question as to how far the entirety of the family property is liable to be sold in execution of decrees against the managing member alone. The failure to keep apart the two questions has been a fruitful source of confusion. However, it must now taken to be settled law that, whether the manager is sued in his representative capacity or not, if the debt is of a nature to support the sale of the entire family property the entire family property can be sold in execution of the decree against him on the footing of such debt—*Manakat Velama* v. *Ibrahim Lebe*[2]; *Nunna Brahmayya* v. *Chidaraboyina*[3]; *Sakharam* v. *Devji*[4]; *Kunj Behari Lal* v. *Kandh Prashad Narain Singh.*[5]

Thus argue their Lordships in the leading case:—If the debt was of a nature to support the sale of the entirety, the manager might have legally sold it without suit; if he could do so, equally could the creditors do so either by suit, *i. e.*, when the claim is upon a mortgage, or in execution when the decree is a money decree—*Nanomi Babuasin* v. *Madun*

1. (1885) I.L.R. 13 C. 21 (35): 13 I.A. 17. 2. (1903) I.L.R. 27 M. 375.
3. (1903) I.L.R. 26 M. 214. 4. (1898) I.L.R. 23 B. 372.
5. (1907) 6 C.L.J. 362.

Mohun[1]. In other words, to use the language of Sir *V. Bhashyam Aiyangar* J. in *Nunna Brahmayya* v. *Chidaraboyina*[2], the Court executes the power vested in the father or the manager for the benefit of the creditor. This, it will be observed, is but an application of the equitable doctrine of the creditor's subrogation to the debtor's right of indemnity. But as the creditor is given this additional benefit, in the words of *Jessel* M. R. in *In re Johnson: Shearman* v. *Robinson*[3] "only to remedy the injustice of the *cestui-que-trust* walking off with the assets which have been earned by the use of the property of the creditor, where the *cestui-que-trust* does not derive any benefit from the loan there is no injustice as beetween him and the creditor, and there is no reason for the Court interfering at the instance of the creditor to give him a larger right than he bargained for." To put it in other words, the circumstances must be such that a duty is cast upon the family to indemnify its manager. The creditor would have no right of resort to the family estate if either because the loan was not justified by necessity or because the manager has wronged the family as for instance where he misappropriates the family funds or by fraudulent mismanagement occasions the necessity, the manager cannot claim indemnity from the family estate. However owing to the peculiar position of the manager, when the debt is for a purpose binding on the family, the circumstances under which he cannot claim indemnity are really few; misappropriation, fraud or exclusion of the other members being the only cases of that kind. Mere inquiry, ever so reasonable, as to the existence of necessity, will not entitle the creditor to execute a decree against the manager when he has failed to sue the family, making it a ground of relief against the family. In this connection *Nagender* v. *Sremuttee*[4] (as interpreted in *Jugul Kishore* v. *Jotendro Mohun Tagore*[5] and *Baijun* v. *Brij Bhookun*[6] seem to be in point. In the former case the widow allowed the Government revenue which she was bound to pay out of the current income to fall in arrear and the mortgagor who paid it up in order to save the estate, instead of suing the widow in her representative capacity sued her personally, charging her with an

1. (1886) I.L.R. 13 C. (21): 13 I.A. 17.
2. (1903) I.L.R. 26 M. 214.
3. (1880) 15 Ch. D. 548 at 556.
4. (1867) 11 M. I.A. 241.
5. (1884) 11 I.A. 66.
6. (1875) 2 I.A. 275.

intention to defraud. In the latter, the decree was a personal decree against the widow for arrears of maintenance which were in the first instance payable out of the current income, though the maintenance holder had also a charge on the estate In other words, in both cases as between the widow and the estate, the widow was the party liable. Under these circumstances their Lordships held that though the mortgagee in the one case and the charge-holder in the other, could have, in the first instance, if they so chose, proceeded against the estate, having elected to proceed against the widow personally they could not any longer proceed against the estate—obviously on the ground that the widow under whom they claimed had no right of resort to the estate. If it were on the ground that the other members were represented by the manager that the decree against him is executable against the family property, it would not have been, as pointed out in *Lala Suraj Prosad* v. *Golabchand*[1], open to the other members to go behind the decree and show that the debt forming the basis of the decree did not as a matter of fact exist. Again as the right to proceed against the family property is based upon the power in the managing member to sell the family property, when that power ceases as when a partition takes place in the family (*Krishnasami* v. *Ramasami*[2]) or where the managing member dies (*Veerappa* v. *Ramasami*[3]) or when an attachment is effected on the share of any other member (*Subraya* v *Nagappa*[4]) it has been said that the power of the Court to proceed against the family property also ceases, and that the creditor is, after that, without any remedy. On the other hand it may be contended that even after the death of the individual member, on the analogy of suits by the creditor to work out the trustee's right of indemnity, it is open to work out his rights against the family. The creditor may have this right also when there has been a partition and no provision is made for the meeting of the manager's liability under the decree. Under the new Code of Civil Procedure, if not also before, it may also be that when the managing member is sued as such, the decree, if for money, may be executed after the death of the manager in the same manner and to the same extent as it could have been if he were alive.

1. (1901) I.L.R. 28 C. 517.
2. (1899) I.L.R. 22 M 519.
3. (1903) I.L.R. 26 M 106.
4. (1908) I.L.R. 33 B 264.

The difference in effect from looking at the question from the different standpoints is well brought out in the case in *Muthuraman* v. *Ettappasami* [1] where it was held that while the father was bound by a sale in contravention of S. 99 of the Transfer of Property Act, he not having applied to set it aside under S.244, C.P.C., the son was not. As the statute prohibited the sale the Court's action was *ultra vires* and could not bind the son. The father having been a party to the suit was confined to his remedies in execution, and if he failed to avail himself of them, he was barred, but such considerations did not apply to the son. The same course of reasoning must lead to the conclusion that a sale in pursuance of an attachment prohibited under S. 266 may, if not objected to in time, bind the father and yet not bind the son. As regards material irregularities vitiating the sale, the son has an election of remedies either to apply under S. 311 or to bring a suit to set aside the sale within a year under Art. 12 of the Limitation Act. Unlike private sales by the father which may be set aside on the mere ground that the sale is for a gross undervalue (*cf. Raja Hurronath* v. *Rundhir*[2]) proper price or no proper price, Court-sales would stand good, if there is no irregularity in the conduct of the sale. But that is not because the father represents the son but because it is a pecularity of Court-sales, due to the respect for the position of Courts.

The difference in the two standpoints is also illustrated by the numerous cases on the effect of S. 85 of the Transfer of Property Act on Court-sales in mortgage suits. The High Courts of Allahabad and Calcutta (*Bhawani* v. *Kallu*[3]; *Lala Suraj Prosad* v. *Golab Singh*[4]) hold that the effect of this section is to leave the interest of the members of the family not made parties unaffected inasmuch as the managing member does not in law represent the other members of the family.

In the light of the above remarks it must be fairly easy to reconcile the various decisions on the topic though it must be confessed that the two standpoints have not been kept distinct even after the case in *Nanomi Babuasin* v. *Madun Mohun*[5]—see

1. (1899) I.L.R. 22 M 372.
2. (1891) 18 I. A. 1.
3. (1895) I. L. R. 17 A. 537.
4. (1901) I.L.R. 28 C. 517.
5. (1885) I.L.R. 13 I. A. 17.

Dwarakanath Chowdhry v. *Bungshi Chundra Saha*[1]; *Baldeo* v. *Mobarak* [2]. So far as the early Privy Council decisions on execution sales go, there is this additional circumstance to be borne in mind, *viz.*, that under the Civil Procedure Code of 1859, what used to be sold in execution was only "the right, title and interest of the judgment-debtor." To pass anything more, either the judgment-debtor must have been sued in his representative capacity or the intention must have been signified somehow to execute the power vested in the judgment debtor. If the manager was not sued in his representative capacity, if there was also no evidence to show that what was really intended to be sold was the interest of the family, it did not matter in the least what the nature of the debt was; the sale could convey only the right, title and interest of the judgment-debtor—*Deendyal* v. *Jugdeep Narain*[3]; *Hurdeo Narain* v. *Pundit Ruder Mitter*[4]; *Sembunath* v. *Golab* [5]; *Pettachi* v. *Sangili* [6]. It was these exigencies of the processual law that called into existence the doctrine of qualified representation that figures so largely in the earlier volumes of the Indian Law Reports: the representation that is not so complete as to make the decision binding but sufficiently effective to pass in execution of the decree the entire interest of the family—*Ittiachan* v. *Vellappan*[7]; *Lala Suraj Prosad* v. *Golab Singh*[8]. It need hardly be said that this qualified representation is nothing more than a declaration of intention to insist upon working out the right of indemnity possessed by the debtor, and apart from the advantages given by processual law, such decrees stand on exactly the same footing as decrees against the manager personally. (See the Full Bench case in *Ittiachan* v. *Velappan*[7]).

There is a consequence that flows from the doctrine of creditor's subrogation to the debtor's indemnity which might be confounded with *res judicata*. It is elementary law that the agent is entitled to be indemnified against the consequence of all acts within the scope of his authority and properly done by him—*Halsbury*, Vol. i, p. 197 : I.C.A. S. 201. When therefore the

1. (1905) 9 C. W. N. 879.
2. (1902) I.L.R. 29 C. 583.
3. (1877) L.R. 4 I. A. 247.
4. (1883) L.R. 11 I. A. 26.
5. (1887) L.R. 14 I. A. 77.
6. (1887) L.R. 14 I. A. 84.
7. (1885) I. L. R. 8 M. 484.
8. (1901) I.L.R. 28 C. 517.

managing member is sued in respect of a debt properly incurred by him for the family and a decree is passed against him in respect of such debt, he would clearly be entitled to sell the family property for the whole decree amount, irrespective of the question whether the amount was really due at the time or not. The decree is binding as between the manager and the family on a principle analogous to that by which the principal is held bound by conclusions in a suit against the surety when the surety gives notice of the action to the principal and asks him to defend it, or the vendee is held bound by a decree against the vendor, when the vendor gives notice to the vendee to defend the title. Once it is granted that as between the manager and the family a decree is binding, it follows that the decree is equally binding as between the creditor who claims under the manager and the family. This is not *res judicata* but the result is not different. But to attract this consequence, the debt in its inception must be admitted or found to have been properly incurred for the family and the question must be only one as to the extent of the discharge or as to the extent of liability under the original contract on its construction.

The doctrine of *bona fide* inquiry may also give a sort of *quasi*-conclusive effect to judgments against the managing member. When, for instance, a suit is brought for the recovery of a debt incurred by the previous manager or to enforce an obligation in respect of the family property not due to any default of the manager, and a decree is passed after a *bona fide* contest on the part of the manager, whether he is sued as such or not, a purchaser in execution of the decree so got would be protected. Surely the purchaser should be excused if he relies upon an adjudication by a Court in the presence of parties most interested in contesting it—*Deendyal* v. *Jugdeep Narain*[1].

We ought also to distinguish cases which proceed upon the principle of estoppel, authorisation or ratification. As it is put in BLACK on *Judgments*, Vol. ii, Ss. 523, 524: "When a person is so identified in interest with one of the parties that he might have been a party himself and might have participated in the conduct of the proceedings, when as a matter of fact, though not on the record, he has taken a direct interest in the institution

1. (1877) 4 I. A. 247.

and progress of the suit, has actually controlled the proceedings * * he may be estopped by judgment as the party on record." These observations have been cited with approval by *Mookerjee* J, in *Lilabati Misrain* v. *Bishun Chobey*[1]. The principle has in effect been applied in *Shangara* v. *Krishnan*[2] where a decree against a benamidar is held binding against the real owner. It is on this principle that the decision in *Kunjan Chetty* v. *Sidda Pillai*[3] substantially proceeds. Similarly there is no reason why the other members should not be bound when they expressly authorise the managing member to sue or defend on their behalf or when the managing member expressly or impliedly sues or defends on behalf of the family and the other members subsequently ratify the act of the manager. When the decisions in *Shangara* v. *Krishnan*[2]; *Kunjan Chetty* v. *Sidda Pillai*[3]; *Alagamuthu* v. *Kolendavelu*[4], and *Narayan Gop* v. *Pandurang*[5] speak of acquiescence, they, as a matter of fact, are referring to one of these principles. Under certain circumstances, aquiescence may be evidence of authorisation, in others of ratification; in others again it may be the foundation of an estoppel. When the manager purports to act on behalf of the family and the other members do not interfere though with full knowledge, in most cases Courts would be justified in drawing the inference of previous authorisation or subsequent ratification. Circumstances such as these do raise a duty on the part of the other members to speak if they do not approve of the doings of the manager, and if they maintain silence, third parties acting on the faith of the manager's representation are entitled to plead that the other members are estopped from re-agitating the questions once already decided. However, under the law there can be no valid ratification when the person whose act is ratified does not in the first instance purport to act on behalf of the person ratifying, and this principle has been applied to acts by managers. Consequently, there can be no question of ratification when the manager does not sue or is not sued as such, and it is not gatherable from the record that he is acting on behalf of the family—see *Sheshan Pattar* v. *Viraraghava Pattar*[6].

Again, when the property stands in the name of one of the members of the family, the more so if he is a junior member or

1. (1907) 6 C.L.J. 261.
2. (1891) I.L.R. 15 M. 267.
3. (1899) I.L.R. 22 M. 161.
4. (1899) I.L.R. 23 M. 190.
5. (1881) I.L.R. 5 B. 685.
6. (1909) I.L.R. 32 M. 284.

when a contract is entered into with one of the members of the family (in all cases where it is a promissory note taken in the name of one of the members of the family) either on the principle that undisclosed principals are bound by adjudications against the agent or on the principle that he who would take the profit must bear the burden, decrees against such members would be binding against the family—*Adaikkalam* v. *Marimuthu*[1]; *Ramanujacharry* v. *Srinivasa Chary*[2]. In view of the decision in *Seshan Pattar* v. *Viraraghava Pattar*[3] this rule may have to be subjected to this qualification, *viz.*, that the contract must not have been entered into on behalf of the family to the knowledge of the other party, as for instance when the contract is in renewal of an earlier admittedly family contract.

Having cleared the ground so far, we shall next proceed to consider how far proceedings by or against the managing members alone are binding against the other members, apart from any authorisation or ratification.

It may be well perhaps in this matter to distinguish some cases which have been on all hands treated as exceptional, *viz.*, suits for partition and maintenance. Owing to the peculiar position of the father in the one case and the nature of the claim in the other, it has been held that a decree against the father in the one case and the managing member in the other, is binding against the other members—*Narakka* v. *Narayana*[4] ; *Subbanna Bhatta* v. *Subbanna Bhatta*[5] ; *Muthia* v. *Virammal*[6] ; *Minakshi* v. *Chinnappa*[7].

Cases of death of the father pending suit or execution, also seem to stand on a different footing from initiation of suits or proceedings. In these cases, the other members would be bound even though the managing member alone is brought on record as representative. But that would be so even if the member that is brought on record is only a junior member, provided he has assets out of which the decree is to be satisfied—*Khirajmal* v. *Daim*[8].

1. (1899) I.L.R. 22 M. 326.
2. (1899) 9 M.L.J. 103.
3. (1909) I.L.R. 32 M. 284.
4. (1883) I.L.R. 6 M. 331.
5. (1907) I.L.R. 30 M. 324.
6. (1887) I.L.R. 10 M. 283.
7. (1901) I.L.R. 24 M. 689.
8. (1904) I.L.R. 32 C. 296.

It is also clear that in order that a decree against the managing member may be binding, the family should have been "efficiently" (*Padmakar Vinayak* v. *Mahadeo*[1]; *Shiddappa* v. *Venkaji*[2]) or "effectively" (*Narakka* v. *Narayana*[3]) represented. The manager cannot be said to have effectively represented the other members when he has not raised an appropriate defence—*Appa Rao* v. *Venkatadri*[4]. As their Lordships say in the analogous case of shebaits (*Prasunno Kumari* v. *Golabchand*[5]): "Before applying the principle of *res judicata*, the Courts should take care to be satisfied that the decrees relied on are untainted by fraud or collusion and that the necessary and proper issues are raised, tried and decided in the suits which led to them" or as laid down in the *Shivaganga case*[6]: "There should have been a fair trial of the right in the suit." When a suit is dismissed for default or is decided *exparte* owing to the negligence of the manager there can be no question of efficient representation and the other members would not be bound—*Brammoye Dassee* v. *Brojonath*[7]. [But see *Subbammal* v. *Arudaiyammal*[8] and *Lakshminarayana* v. *Venkayya*[9].—Ed.] When, for instance, the managing member, instead of utilising the means at his disposal, credulously trusts to the oath of the opposing defendant, the decree so obtained is not binding against the other members—*Thenju* v. *Chimmu*[10].

On the authorities it seems also to be clear that the other members would not be bound unless the managing member purports to act on behalf of the family—*Sunder Lal* v. *Chhitay Lal*[11]; *Vasudevan* v. *Shankaran*[12]; *Ramnarain* v. *Bisheshar Prosed*[13]; *Muhammad Hussain* v. *Dip Chand*[14]. Whether he has done so is a question of fact depending upon the circumstances of each case—*Appa Rao* v. *Venkatadri*[4]. The mere fact that it is a matter in which the other members of the family are also interested will not do—*Muthia* v. *Virammal*[15].

But if the father is the manager and the question in issue is one which equally affects him and the other members of the family, and if the suit is properly defended, the adjudication

1. (1885) I.L.R. 10 B. 21.
2. (1908) I.L.R. 32 B. 404.
3. (1883) I.L.R. 6 M. 331.
4. (1907) 17 M.L.J. 197.
5. (1875) 2 I.A. 145.
6. (1863) 9. M.I.A. 539
7. (1876) I.L.R. 2 C. 222.
8. (1906) I.L.R. 30 M. 3.
9. (1907) 17 M.L.J. 160.
10. (1884) I.L.R. 7 M. 413.
11. (1906) I.L.R. 29 A 1.
12. (1896) I.L.R. 20 M 137.
13. (1888) I.L.R. 10 A 411.
14. (1892) I.L.R. 14 A. 190.
15. (1887) I.L.R. 10 M. 283.

will bind all persons interested along with the father, for the reason that in that case, it must be presumed that the father represents the interests of all—*Kunjan Chetty* v. *Sidda Pillai*[1] citing *Jogendro Deb Roy Kut* v. *Furindro Deb Roy Kut*[2]. In other words the subject-matter of the suit might in itself justify the inference that the suit was in a representative capacity. In determining this question of representative capacity the fact that the manager is the plaintiff or the defendant might be also of some significance. For instance where the manager sues in ejectment, asserting the common title of the family, there could be no question but that the suit is brought in his representative capacity; on the other hand, if the manager is sued in trespass the suit may or may not be a suit brought against him in his representative capacity; and accordingly, unless there are indications to show in the plaint that he has been sued as representing the family there could be no question of the family being bound—*Ramnarain* v. *Bisheshar Basia*[3]—though it might be he sets up a family title as justification for his acts. The fact that he defends on behalf of the family or pleads a family title cannot by itself make the suit against him one in his representative capacity.

This leads us on to the question as to whether suits can be brought at all by or against the manager as such. On this point it must be confessed there is a considerable amount of conflict and our conclusions can be stated only tentatively and not with any amount of confidence.

Referring to the state of law in 1856, *West* J. says that the managing member used to represent the common interests of the family just as much as in other transactions, and proceeds to express the opinion that all that the new Procedure requires is an express statement that he sues or is sued as such. *Gan Savant* v. *Narayan*[4] Mr. MAYNE p. 381 (7th Edn.) seems to be of opinion that this is still the law. This view, has, however, been judicially declared to have been a concession to inexperience in pleading before the establishment of regular tribunals and to have no justification under the Code of Civil Procedure though

1. (1899) I.L.R. 22 M. 461.
2. (1871) 14 M.I.A. 367 at 376.
3. (1888) I.L.R. 10 A. 411.
4. (1883) I.L.R. 7 B. 467.

there are *dicta* to the contrary *Arunachala* v. *Vythialinga*[1]; *Mutha* v. *Virammal*[2]; *Ramnarain* v. *Bisheshar Basir*[3]; and *Ramayya* v. *Venkataratnam*[4]. The observations in *Kanna Pisharodi* v. *Pisharodi Somayajipad*[5] of *Turner* C. J. and *Kindersley* J., that "unless by a special provision of the law co-owners are permitted to sue through some or one of their members, all co-owners must join in a suit as to their joint property. Co-ownesr may agree that their property shall be managed and legal proceedings taken by some or one of their members, but they cannot invest such person or persons with competency to sue in his ownname on their behalf or if sued to represent them" have been held to govern the case of managers—*Alagappa Chetty* v. *Velliappa Chetty*[6]. It has even been held that " if from any cause, such as lapse of time, the other members cannot be joined as plaintiffs the whole suit must fail"—*Shamrathi Singh* v. *Kishan Prasad*[7]. In this view, however, the case in *Shamrathi Singh* v. *Kishan Prasad*[7] is alone and is in apparent conflict with *Ramayya* v. *Venkataratnam*[4] where it was held that when a suit is brought by the managing member as such, the defect of non-joinder is only a formal defect and the suit is not liable to be dismissed merely because when the other members are made parties, the suit is barred. A similar view has been taken in *Thakurmani Singh* v. *Dai Ram*[8], and *Pateshri Pratap Narain* v. *Rudranarain*[9] also is to the same effect. The decision in *Shamrathi Singh* v. *Kishan Prasad*[7] may be justified perhaps on the ground that there the members of the family had constituted themselves into a partnership and as such all the rules of ordinary partnership applied to them—*Kalidas* v. *Nathu*[10]; *Boydona Bag* v. *Girish Chunder*[11]. This, perhaps, is also the justification for the decision in *Alagappa Chetty* v. *Velliappa Chetty*[6]. It may be observed, by the way, that *Sir T. Muthusamy Aiyar* J. was a party to the decision in *Ramayya* v. *Venkataratnam*[4], as well as the decision in *Alagappa Chetty* v. *Velliappa Chetty*[6]. The decision in *Seshan Pattar* v. *Viraragava Pattar*[2] is not inconsistent with the view in *Ramayya* v. *Venkataratnam*[4], as is apparent from the anxiety of the learned

1. (1882) I.L.R. 6 M. 27.
2. (1887) I.L.R. 10 M, 283.
3. (1888) I.L.R. 10 A. 411.
4. (1893) I.L.R. 17 M. 122.
5. (1881) I.L.R. 3 M. 234.
6. (1894) I.L.R. 18 M. 33.
7. (1907) I.L.R. 29 A. 311.
8. (1906) I.L.R. 33 C 1079.
9. (1904) I.L.R. 26 A. 528.
10. (1883) I.L.R. 7 B. 217.
11. (1881) I.L.R. 6 C. 815.
12. (1909) I.L.R. 32 M. 284.

Judges to state that the suit was not brought by the managing member as such. A similar conclusion seems also to be involved in the view of the Courts that non-joinder is a defect that is cured by the objection not being taken in time—*Paramasiva* v. *Krishna*[1]. As was pointed out in *Dursun Singh* v. *Durbijoy Singh*[2], it is impossible to see how an objection to the right of suit can be cured by the defect not being pointed out in time. The truth of it is, as observed by Sir *Lawrence Jenkins* C.J., in *Guruvayya* v. *Dattatraya Anant*[3], that the right of the managing member to sue alone (that was the case of the manager suing) is not altogether excluded. Only, the defendants are entitled, for their own protection, to have the other members made parties. If, however, the suit proceeds without objection and a decision is given, the decree would bind the other members, provided, of course, the suit is efficiently prosecuted, That a representation, though incomplete in strict law, may yet be sufficient has been laid down in more cases than one unconnected with Hindu joint family—see *Khirajmal* v. *Daim*[4] as interpreted in *Ramasami* v. *Oppilamani*[5]; *Sundindra* v. *Budan*[6]; *Hari Saran* v. *Bhubaneshewari*[7]; *Kadir* v. *Muthukrishna*[8]. The latest instance of it is found in *Raja Ranjit Sinha* v. *Basant Kumar Ghosh*[9] where a decree against a person left in possession of the trust estate by the Shebait was held binding against the trust. The view that once prevailed that, outside S. 30 and the case of trustees, executors and administrators, no representative suit is contemplated by the Code of Civil Procedure, can no longer be sustained as accurate—*Vasudeva* v. *Sankaran*[10]; *Chiruvolu* v. *Chiruvolu*[11].

The words of caution uttered by the late *Muthusamy Aiyar* J. in *Thenju* v. *Chimmu*[12] as regards the binding nature of decrees in suits against Karnavans, seem to be applicable to the case of managers. He observes: "The decided cases do not seem to be uniform. They suggest two propositions : (i) a judgment is only binding *inter partes*; the judgment obtained against Karnavans is

1. (1891) I.L.R. 14 M. 198,
2. (1909) 9 C.L.J. 623.
3. (1903) I.L.R. 28 B. 11.
4. (1904) I.L.R. 32 C. 296.
5. (1909) I.L.R. 33 M. 6.
6. (1885) I.L.R. 9 M. 80.
7. (1888) 15 I.A. 195.
8. (1902) I.L.R. 26 M. 230.
9. (1908) 9 C.L.J. 597.
10. (1896) I.L.R. 20 M. 129 at 137.
11. (1906) I.L.R. 29 M. 390.
12. (1884) I.L.R. 7 M. 413.

in no case binding against the Anandravans. (ii) The Karnavan is the head of the family and the judgment against him binds the Anandravans unless he was guilty of fraud or collusion. Neither proposition is free from doubt. The Karnavan's position and power as the recognised head of the family is ignored in the first while the qualified nature of his power is not recognised in the second." The learned Judge proceeds to observe that it is only when there is efficient representation that the others would be bound. It cannot be broadly laid down with respect to the Manager as it has been with respect to the Karnavan that when he is sued in his representative capacity and honestly defends the suit the judgment is binding against the other members. The defence must not only be honest but also efficient. Unlike the Karnavan the Manager does not, in strict law, represent the family, but having regard to his position in the family, when in fact he efficiently represents the family, the law protects the opponent *bona-fide* litigating against him by precluding the other members of the family, of whose existence even he was possibly unaware, from raising the same questions again. Some such must be the right view, or there is no means of explaining the assumption made in a long series of cases [vide *Jogendro Deb* v. *Funindro Deb* [1]; *Ramnarain* v. *Biskeshur Basia*[2]; *Mahammad Hussain* v. *Dipchand*[3]; *Choudhry Ahmad* v. *Seth Raghubar*[4]; *Multha* v. *Virmamal* [5]; *Veerappa* v. *Ramaswami*[6]; *Appa Rao* v. *Vankatadri*[7]; *Kunjan Chetti* v. *Sidda Pillai* [8]; *Narayan* v. *Pandurang*,[9]] *viz.*, that a decree against the managing member as such is binding against the other members. The proposition laid down above as to the binding nature of the decree against the managing member is subject to this qualification, *viz.*, that the suit must be upon a cause of action which is admittedly a family cause of action. When the suit is for the recovery of a debt incurred by the managing member (*Shrinath Das* v. *Hari Pada Mitter*[10]) or when the suit is based upon a default by the managing member (*Appa Rao* v. *Venkatadri*[7]) it cannot be

1. (1871) 14 M. I. A. 376.
2. (1888) I. L. R. 10 A. 411.
3. (1892) I. L. R. 14 A. 190.
4. (1905) I. L. R. 28 A-1.
5. (1887) I. L. R. 10 M. 283.
6. (1903) I. L. R. 27 M. 106.
7. (1907) 17 M. L. J. 197.
8. (1899) I. L. R. 22 M. 461.
9. (1881) I. L. R. 5 B. 685.
10. (1899) 3 C. W. N. 636.

said that the interests of the family and the manager are the same, and on general principles governing representative suits the managing member is disqualified to represent the family and any adjudication against him will not bind the other members.

One question alone remains for consideration, *viz.*, as to how far compromise decrees in favour of or against managing members are binding against the other members. That they can avail themselves of such decrees goes without saying and needs no consideration. It is a well-established principle that compromise decrees in representative suits under S. 30 do not operate as *res judicata* against the parties represented—*Jenkins* v. *Robertson*[1]. Their validity would, therefore depend entirely upon considerations on which the validity of compromises without the further sanction of the Court depends.

B. SITARAMA RAO, B.A., B.L.

NOTES OF INDIAN CASES.

Juddab Gobindh Singh *v.* **Hyath Bhundulaka.**— I.L.R. 37 C. 171.—The decision in this case rests upon the principle that S. 562 of the old Code corresponding to O. 41, R. 23, must be taken as subject to the other provisions of the old Code such as Ss. 27, 32. Where an appellate Court makes an order under these sections and it is necessary to send the case back to the Court of First Instance it will have jurisdiction to do so and S. 564 will not operate as a bar to the exercise of that power. Besides the Allahabad case referred to, reference may be made to the Full Bench decision of the Madras High Court in *Krishna Aiyar* v. *Kuppen Ayyengar*[2].

Nimdi Chand Addya v. **Golam Hossein.**—I. L. R. 37 C. 179.—We are extremely doubtful as to the propriety of the decision in this case that a permission of the Cadi subsequently obtained to an alienation of wakf property by a Mutwali renders the alienation valid. We do not think the texts relied upon by the Division Bench in this case support their view. The learned Judges rely upon texts Nos. 8 and 9. Text No. 8 gives as a condition precedent for the validity of the alienation by a Mutwali that the permission of the Cadi should be obtained. It also states that if the Cadi happens to be at a distance the

1. (1875) 1 Sc. Ap. 117. 2. (1906) I.L.R. 30 M. 54.

Mutwali may borrow on his authority. That does not justify the proposition that the subsequent consent of the Cadi validates the alienation. The text runs thus: "When it is indispensable to borrow, it is permitted with the sanction of the Cadi, if he does not happen to be at a distance from him (that is the *Mutwali*), because the Cadi has general powers with respect to what is beneficial for the Muslims." From this it does not follow that if the Cadi is at a distance an alienation may be made without the sanction of the Cadi or the sanction of the Cadi subsequently obtained renders it valid. Anyhow these texts do not justify the view that where the alienee brings a suit the Court's finding that the transaction is necessary is a sufficient sanction when immediately after the transaction no sanction is applied for and obtained from the Court.

Lakhi Narayan Ghose *v.* The Emperor.—I. L. R. 37 C. 221.—We think that the doubt thrown by Mr. Justice *Carnduff* on the correctness of the decision in *Thakur Pershad Singh* v. *The Emperor*[1] is well founded and it is adding to the Criminal Procedure Code to say that a person who is both an agent to the Court of Wards and a Magistrate is not entitled to take cognizance of an offence merely because information has come to him as Manager or Agent of the Court of Wards. S. 190 (1), Cl. (*c*), of the Cr. P. C. entitles a Magistrate to take cognizance of an offence upon his own knowledge or suspicion. As the learned Judge points out there is really no hardship as, under S. 191, the Magistrate taking cognizance of the case is bound to inform the accused that he is entitled to be tried by another Magistrate; and if the accused insists the trial must be by some other Magistrate.

Inder Rai *v.* Brown.—I.L.R. 37 C. 236.—The remark of the learned Judges in this case that S. 256 of the Cr. P. C., does not say at what particular time the accused is to be asked by the Magistrate the question whether he wishes to cross-examine the prosecution witnesses and up to what time he has this right must be taken along with the facts of the case. The learned Judges should not be understood as holding that the accused has this right even after the remaining prosecution witnesses (*i.e.*, the witnesses remaining to be examined after

1. (1906) 10 C.W.N. 775.

the charge is read and explained to the accused and not examined before) are called and examined, cross-examined and re-examined, and the accused enters upon his defence. The section states that if the accused wishes any of the prosecution witnesses to be cross-examined such witnesses shall be recalled and discharged after cross-examination and re-examination. It is only after this that the evidence of any remaining witness for the prosecution shall be taken. After their cross-examination and re-examination they shall be discharged. Finally and after this the accused may be called upon to enter upon his defence and produce his evidence. Hence after the accused claims to be tried on a charge being framed against him there are three stages:—*Firstly*, the recalling of witnesses for prosecution for the purpose of cross-examination and re-examination (*i. e.* such of them as are named by the accused); *secondly*, the examination, cross-examination and re-examination of other witnesses for the prosecution not called before; and *lastly*, the examination, cross-examination and re-examination of defence witnesses. The recalling of witnesses for the prosecution for cross-examination and re-examination must be before the *second stage* mentioned above and at any rate before the *third stage* when the accused enters upon his defence. Hence upon being asked whether he requires any of the prosecution witnesses to be recalled and if he makes no answer and other prosecution witnesses are examined, cross-examined and re-examined, or the witnesses for the defence are called, the accused must be taken to have waived any right which he had to recall them. At any rate he will not be allowed to exercise that right as a matter of course.

Jadu Nandan Singh *v.* Emperor.—I.L.R. 37 C. 250.—We would invite the attention of all Magistrates and Judges to the remarks of their Lordships at pages 257 and 258 of this report where they enunciate the principles which should guide Courts in taking action under Ss. 195 or 476 of the Cr.P.C. "No sanction should be granted unless there is a reasonable probability of conviction. It would be an abuse of the powers vested in a Court of Justice if sanction were given or upheld on the principle that, though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be threshed out, so that it may be decided whether or not an offence has

been committed * * * Great care and caution are required before the criminal law is set in motion and there must be a reasonable foundation for the charge in respect of which prosecutionis sanctioned or directed." It is the fashion with many Magistrates and Judges, including some High Court Judges to grant sanction readily or not to disturb an order granting sanction on the ground that it is as well to ask the accused to clear his character. The mischief accruing to the accused and the vexation and annoyances to which he will be subjected are matters of common knowledge. As stated by the learned Judge it is an abuse of the powers vested in a Court of Justice to grant sanction upon these grounds. It is no slight thing to a subject when the criminal law is set in motion against him, and no sanction ought to be given unless there is a reasonable foundation for the charges.

Padmabati Dasi *v.* Rasik Lal Dhar.—I. L. R. 37 C. 259.—The principle that statements of a deponent's belief cannot be admitted is subject to the exception that they are admissible on interlocutory motions provided that the grounds of such belief are stated with sufficient particularity. Where affidavits are founded on information and belief the sources of the information should be stated and the Court of Appeal in England (see *J. L. Young Manufacturing Co.*[1] and *Lumley* v. *Osborne*[2]) has condemned in no measured terms the practice of giving such affidavits without pointing out the sources of information and grounds of belief. O. XIX, r. 3, does not lay down any new rule or principle, but it only reiterates the previously existing law and gives notice to the practitioner of the consequences of disregarding the rule. As regards the re-hearing of a matter by the Court before the formal order is drawn up, even in England there is no specific rule in the rules of the Supreme Court, and yet it is a settled principle that Courts there have this jurisdiction as part of their inherent powers and the same principle will apply to Courts in this country.

Khajeh Salimulla *v.* Abdul Khair M. Mustafa—I. L. R. 37 C. 263.—It is a general principle of jurisprudence not in any way peculiar to Mahomedan Law that the direction

1. (1900) 2 Ch. 753 2. (1901) 1 K. B. 532.

of the founder of an endowment ought not to be disregarded but should be given effect to. The Mahomedan Law contains express texts on the matter; some of these texts also state the exceptions to this principle, and these texts are cited by the Division Bench (*Mookerjee* and *Vincent* JJ.) at pp. 268 to 270 of the report. The principle and the exceptions are stated in MACNAGHTEN'S *Principles*, Ch. X, title Endowments, Ss. 8 and 10.

Where the founder appointed himself as *Mutwali* and named a person as his successor and authorised such successor to appoint from among his children to the office, and the successor died before the founder, the latter will have the right under the Mahomedan Law to nominate again another person. If the founder dies without making any nomination his executor will be entitled to nominate. Where such founder has appointed his wife as executor and authorized her to superintend over the Mutwali appointed by him, the widow is not a Mutwali or general trustee but has powers of superintendence. It is stated by the learned Judges in this case that "she had no authority express or implied, to modify in any way the terms of the trust-deed, nor had she authority to renounce the office and appoint a successor." To the first part of the statement no exception can be taken, but the second part of it seems hardly correct in the light of the principles above stated and in the light of the text cited at the bottom of p. 275 of the Report and translated at p. 276. The statement, of course, will be justifiable if the widow is not to be regarded as an executor appointed under the will, and apparently, if the widow is not the executor, she cannot be regarded as a Mutwali and she can have no right to appoint a Mutwali. The *Cadi* alone will be entitled under such circumstances to appoint a Mutwali. There was, therefore, no office of Mutwali to be renounced by the widow and the settlement made by her can confer no rights.

Where the office of Mutwali devolves upon a person by appointment by a preceding Mutwali, the High Court applied Art. 120 of the Limitation Act, without however discussing the question whether the nature of such office is really not hereditary. In the case under notice the suit was barred by limitation whichever Article (Art. 124 or 120) was applied.

Bhaja Hari Maiti v. Gajendra Narain Maiti.—I.L.R. 37 C. 282.—The wonder in this case is not how it came to be fought out in three Courts but how it came to be reported. From the meagre report of the facts the case seems to be this. There was a prior and a subsequent mortgagee. The latter brought a suit upon his mortgage making the mortgagor and the prior mortgagee parties. It would appear that the prior mortgagee or the person claiming under him obtained also a transfer of the mortgagor's interest. The subsequent mortgagee obtained a decree upon his mortgage apparently for the sale of the mortgaged property and nothing seems to have been reserved in the decree as regards the prior mortgagee's rights. The prior mortgagee was, therefore, a judgment-debtor strictly and would be entitled to pay off the decree-debt. He applied for the payment of the decree-debt. The decree-holder (the subsequent mortgagee) apparently objected to this—it does not appear from the report on what grounds we think the only conclusion that can be come to upon these facts is that the defendant will be entitled to pay and discharge the decree-debt and apparently this is the only decision in this case. There was not even a question of sale nor an application even under S. 310-A. So far as that conclusion goes no principle of law, at any rate worth reporting, appears.

The learned Judges, however, proceed to make some remarks upon the assumption that the prior mortgagee had not obtained the interest of the transfer of the mortgagor. Even then as they were defendants in the suit and the decree did not reserve their rights as prior mortgagees they would be entitled to pay off the decree-debt and no question of the rights of a prior mortgagee as such would arise.

When a decree is obtained by a puisne mortgagee for the sale of the mortgaged property subject to the prior mortgagee's rights, a question may arise whether the prior mortgagee will be entitled to pay the decree-debt. The learned Judges in this case seem to take the view that he will be so entitled and that the prior mortgagee may have his rights settled in an application under S. 244. If the learned Judges mean by this that the prior mortgagee will be entitled to have his rights upon a prior mortgage settled in an application under

S. 244 we think the cases will not justify them. At any rate it is not such an easy matter as can be disposed off so summarily as the learned Judges have done.

Narsinh *v.* **Vaman Venkata Rao.**—I. L. R. 33 B. 91.—Though under the Limitation Act of 1877 the preponderance of authority has been in favour of the view that S. 22 did not apply to transpositions of parties already on record, a contrary view has been occasionally held (see *Sri Rangachariar* v. *Ramasami*[1].) The question has now been set at rest by the express enactment in S. 22 of the new Limitation Act of a provision that the section shall not apply to cases of transposition.

But in the case under notice the transposition of the parties involved also an amendment of the nature of the claim in the suit. Opinions are often likely to differ as to how far an amendment changes the character of the suit. But here again the rigid rule enacted in the proviso to S. 53 of the old Civil Procedure Code, forbidding a change in the character of the suit, does not find a place in the new Code (see O. VI, r. 17). The matter is completely left to the discretion of the Court, which, however, judging by English precedents, will be well exercised in disallowing any substantial change in the character of the suit.

Pilu *v.* **Babaji.**—I. L. R. 34 B. 165.—With reference to the rule that the consent of the reversioners gives to an alienation by a Hindu widow a validity which it would not otherwise have, the learned Judges in this case hold that having regard to the reason underlying it, the rule should be limited to 'transfers *for consideration*' and cannot be extended to transfers by way of gift. The reason of the rule is stated by them to be that such consent 'affords good evidence that the transfer was made for justifying cause, that is, for legal necessity' and, if so, it follows that the rule can have no operation in the case of a ***gift*** 'where there is no room for the theory of legal necessity.'

Since last we drew attention to the subject in the pages of this journal (19 M.L.J. 7), the crop of decisions on the point—to speak only of the reported cases—has been as remarkable for its variety as before, and, what is more remarkable still, all these con-

1. (1894) I. L. R. 18 M. 189.

flicting decisions profess to find support for their respective views in the Judgment of the Privy Council in *Bajrangi Singh's case*[1]. We cannot congratulate that august tribunal for the way in which it has dealt with a question that is a prolific source of litigation in this country, especially when, as is shown by the references in the Judgment, that body was aware of the divergent views prevailing among the Courts of this country. But we cannot help thinking that the several Indian Courts show too much of a parochial spirit in squeezing out of that judgment a theory consistent with the views respectively held by them before that decision. We venture to doubt if such a course is necessitated by the rule of *stare decisis* which properly applies only to a rule of decision and not to the *reason* of the rule.

The Bombay High Court, as shown by the case under notice, still adheres to the theory that the consent of the reversioners is of *evidentiary* value. But the Privy Council, as early as in the *Cavali* case, enunciate the rule with reference to an alienation *ex hypothesi not otherwise legitimate* and it is difficult to hold that the reversioners' consent is in such cases regarded merely as raising a *presumption* of necessity. For instance, can the presumption be displaced by proving the absence of necessity, in the case of a transfer for consideration? The Bombay High Court also holds that the doctrine of surrender cannot be applied to alienations of *portions* of the husband's property.

The Calcutta High Court, on the other hand, continues to regard the rule as based on the widow's right to 'surrender' and in this view, the consent of the reversioners will give validity as much to a *gift* as to a transfer for consideration; and it is immaterial whether the gift or transfer is to the reversioner himself or to a stranger, with the consent of the reversioner—*Kanuram Deb* v. *Kashi Chandra*[2]; *Bejoy Gopal* v. *Girindra Nath*[3]. The Calcutta High Court also holds that the decision of the Judicial Committee in *Bajrangi's case*[4] confirms the interpretation placed by that Court on *Behari Lal* v. *Madho Lal*,[4] *viz*, that it does not prohibit a surrender of a *portion* of the husband's property.

1. (1907) I. L. R. 30 A. 1 (PC.)
2. (1909) 14 C. W. N. 226.
3. (1908) 8 C. L. J. 458.
4. (1891) I. L. R. 19 C. 236.

The Allahabad High Court, in its turn, seeks to limit within the narrowest compass the disapproval expressed by the Judicial Committee of the decision of that Court in *Ramphal Rai* v. *Tulakuari*[1], and accordingly, in a recent case before that Court, it was held, following the earlier Full Bench decision, that the consent of the nearer or presumptive reversioner will not validate a *gift* by the widow—*Bhaktawar* v. *Bhagwan.*[2] No attempt is, however, made to discuss the reason of the rule.

In Madras, there was a marked difference of opinion among the learned judges who constituted the Full Bench that heard *Rangappa Naik* v. *Kamti Naik*,[3] but the majority (Sir *Arnold White* C.J. and *Sankaran Nair* J.) held that the earlier decision of this Court in *Marudamuthu Nadan* v. *Srinivasa Pillai*[4] has not been overruled by *Bajrangi's case*[5], and another Division Bench (Sir *Arnold White* C. J. and *Miller* J.) has since taken the same view—*Muthuveeran* v. *Vithilinga* [6].

The view taken in Madras that the consent of the presumptive reversioner, even where it cannot serve to validate the widow's alienation, may yet estop the *actual* reversioner from disputing the alienation, does not so far seem to have been considered by the other Courts in this country. To what has been already said against this view, we may now add that the Judgment of the Judicial Committee in a more recent case (*Lala Rup Narain* v. *Mussamat Gopal Devi*[7]) would rather seem to show that their Lordships still considered the point *open.*

Gangabai v. Baswant.—I. L. R. 34 B. 175.—A person holding Vatan land on a tenure which rendered it inalienable beyond his lifetime mortgaged the land to a creditor, describing it correctly as Deshgat Vatan attached to his hereditary office. The learned Judges hold that, even if by a subsequent settlement with the Government the Vatandar had become entitled to the fee simple in the lands, the mortgagee could not, after the mortgagor's lifetime, claim as against his heirs to hold the property as security. We feel grave doubts as to the correctness of this decision and as to the appropriateness of the ground on which it is based.

---

1. (1883) I. L. R. 6. A. 116. (F. B.) 2. (1910) 7. A. L. J. 121.
3. (1908) I. L. R. 31 M. 366. 4. (1897) I. L. R. 21. M. 128.
5. (1907) I. L. R. 30 A. 1 (P.C.) 6. (1908) I. L. R. 32 M. 206.
7. (1908) I. L. R. 36 C. 780.

So far as we could judge from the report of the argument, the claim on behalf of the mortgagee seems to have been rested on the doctrine of *accession* (under S. 70 of the Transfer of Property Act) and not on the principle of S. 43 of that Act. It is hardly necessary to point out that the two provisions rest on different principles and that the former is confined to mortgages. We are unable to see why under the theory of accession, a subsequent enlargement of the mortgagor's estate should not enure to the benefit of the mortgagee's *security* quite as much as the renewal of a mortgaged leasehold. But there is no reference to this question in the judgment.

As regards S. 43 of the Transfer of Property Act, it seems to us that in the case under notice, its application could have been excluded on the ground that there was no 'erroneous representation' (cf. *Jagannath* v. *Dibbo*[1]). But the learned Judges choose to base their decision on the broader ground that at the date of the mortgage the mortgagee knew or *ought to have known*, as a matter of law, that the land was inalienable beyond the mortgagor's lifetime and that therefore he could claim no title by estoppel for he could not have been misled. This decision has in a recent case in the Madras High Court (A. S. 152 of 1906, decided by *Benson* and *Krishnaswami Aiyar* JJ.) been understood as laying down that S. 43of the Transfer of Property Act is of the same scope as the principle of estoppel enacted in S. 115 of the Evidence Act and could therefore have no operation where, at the time of the transfer, the transferee knew that the transferor had no interest or had only a limited interest (cf. also *Mokhoda Debi* v. *Umesh Chandra*[2]). It however seems to us that even accepting this view of S. 43, the learned Judges of the Bombay High Court have gone too far in holding the mere *presumption of a knowledge of law* to be equivalent to *actual* knowledge of the transferor's defective title, so as to exclude the operation of the doctrine of estoppel. Such an extreme view would seem to be inconsistent with the decision of the Madras High Court in *Anjannayya* v. *Narasanna.*[3] But it may, in turn, be said that that decision is open to doubt, if alienations of Village Service Inams are to be regarded not merely as void but as *forbidden* by law. (Cf. *Radha Bai* v. *Kamod Singh.*[4])

1. (1908) 6 A. L. J. 49.
2. (1907) 7 C. L. J. 381.
3. (1907) 18 M. L. J. 247.
4. (1907) 4. A. L. J. 696.

Coming next to the question of the true scope of S. 43, we are by no means sure that it rests merely on the doctrine of estoppel and is subject to the same conditions and limitations. It is rather significant that neither in the body of the section nor in the illustration is there any reference to the transferee *being induced* to change his position by the representations of the transferor, though it is clearly so stated in S. 115 of the Evidence Act as well as in the illustration to it. We have no right to assume that the omission is merely accidental. Section. 43 of the Transfer of Property Act may as well rest also on what is popularly known as the doctrine of 'making representation good' as on the doctrine of 'changed situations' and it may find its analogue in S. 18 of the Specific Relief Act as well as in S. 115 of the Evidence Act. A representation, false when made, may operate either as a term (express or implied) in a contract—which the contractor and his representatives may be called upon *to give effect to*—or as an estoppel which merely *precludes* the party making the representation and his privies from denying its truth (see per *Stephen* J. in *Alderson* v. *Maddison* [1]). Bearing this in mind, a comparison of the language of S. 43 of the T. P. Act ('shall at the option of the transferee operate on any interest which the transferor may acquire') with that of S. 115 of the Evidence Act ('shall not be allowed to deny the truth') and that of S. 18 of the Specific Relief Act (' the purchaser may compel him to make good the contract out of such interest') is not without interest. And it may also be noted that the exception in the section in favour of *interim* transferees in good faith and for value assimilates it more to the principles governing the exercise of optional rights in contracts than to those applicable to the common law doctrine of title by estoppel. (Cf. *General &c: Company* v. *Liberator Co. Society* [2] ; *Sugden's Vendors and Purchasers*, p. 355,) And the representation, if construed as a warranty, may, when the new interest is acquired *after completion* of the transfer, as well entitle the transferee to claim to remain in possession for the whole right, as, when the same happens before the completion, he may under S. 18 of the Specific Relief Act, call for a conveyance of the whole interest. The representation may be express or implied and whether or not

1. (1880) L. R, 5 Ex. D. 293, 2, 1878, 10 Ch, D. 15.

in any particular case the representation will be construed as a warranty or a term in the contract, will depend upon the circumstances of each case and the language employed. And for this purpose, the knowledge of the transferee may be material as leading to an inference that the parties could not have meant the representation to be a *term* in the contract. But where it is such as to amount to a term, the knowledge of the transferee cannot as a *matter of law* disentitle him to insist that the representation should be made good, for in the law of contracts, as is well known, one of the contracting parties is entitled to take the other *at his word*, whatever his own knowledge or means of knowledge may be. (See LEAKE on *Contracts*, pp. 248-9, where the distinction is pointed out between 'misrepresentation' and 'warranty' Cf: *Cato.* v. *Thompson*[1]; *Redgrave* v. *Hurd*[2]).

SUMMARY OF ENGLISH CASES.

Parker *v.* Jones. [1910] 2. K. B. 32.

Landlord and tenant—Covenant not to underlet—Under-lease—Surrender—Acceptance of—Effect of, on under-lease.

It is a rule of law that if there is a lessee and he has created an under-lease, or any other legal interest, if the lease is forfeited, then the under-lessee, or the person who claims under the lessee, loses his estates a well as the lessee himself; but if the lessee surrenders he cannot, by his own voluntary act in surrendering, prejudice the estate of the under-lessee or the person who claims under him. Therefore if the original lessor accepts a surrender of the lease when there is an under-lease, he cannot thereafter do anything to prejudice the under-lessee such as re-letting the land to somebody else or himself taking possession before the expiry of the term to which the under-lessee might be entitled.

In re A Debtor [1910] 2 K. B. 59 (C. A.)

Bankruptcy—Discovery—Interrogatories.

Proceedings in Bankruptcy are in the nature of penal proceedings in as much as they result or may result in an alteration of the debtor's status. As the principles on which discovery and interrogatories have been allowed in actions in the High Court

1. (1882) 9: Q. B D 616.   2. (1881) I. L. R. 20 Ch, D.1

show that when the real issue is of a penal nature neither discovery nor interrogatories will be allowed, a petitioning creditor who has sworn that the debtor has made a fraudulent transfer of his property is not entitled, before the hearing of the petition, to obtain an order for interrogatories or for discovery, in order to prove the truth of his allegations.

In re **John Tweddle and Co., Ltd.** [1910] 2. K. B. 67.

Official Receiver—Statutory Officer—Report charging fraud on Director of Company—Director discharged of fraud—Official Receiver not liable to pay costs personally.

An Official Receiver who is appointed, under the Companies Acts, liquidator of a Company and has, in that capacity, to make a report as to the formation, working and reasons as to the winding up of the Company is a statutory officer and as such his reports are privileged even if they contain statements charging any Director of the Company with fraud, etc., in respect of the matters contained in the report. Even if in the enquiry the Court finds that the Director is not guilty of the charges made against him his costs can only be ordered to be paid out of the assets, if any, of the Company, and not by the Receiver personally.

Bamfield *v.* Goole & Sheffield Transport Co., Ltd. [1910] 2. K. B. 94 (C. A.)

Carrier—Dangerous goods—Wrong description—Liability of consignor.

The defendant consigned to the plaintiff's husband, a common carrier, packages of ferro-silicon, not describing them as such but as general goods, neither side knowing that the goods were dangerous to carry. Poisonous gases emanating from those goods caused the death of plaintiff's husband and illness of the plaintiff. *Held* that the defendant was liable.

Per *Vaughan Williams* L. J.—The consignor is bound to give to the carrier such information as he had as to the nature of the article delivered and therefore was liable for all the consequences of wrong description.

Per *F. Moulton* and *Farwell* L. JJ.—Just as a common carrier is under a duty to carry all goods not known to be dangerous

there is a corresponding duty on the consignor to deliver only such goods as are fit to be carried. There is an implied warranty by him that the goods are safe to be carried. Unless the carrier knows or has reason to know the dangerous character of the goods, the consignor is liable for all damages to human beings and to goods of other consignors arising from his neglect to fulfil his duty in the matter of giving information to the ship-owner as to the dangerous character of the goods delivered.

Salts *v.* Battersby. [1910] 2 K. B. 155.

Landlord and tenant—Assignment on sub-lease of a portion of leasehold property—Apportionment of rent—Principle of.

The plaintiff's tenant assigned on sub-lease a portion of the leasehold property to the defendant and disappeared altogether. Plaintiff filed a suit against the defendant for the whole of the rent due for the whole of the premises.

Held (1) that the defendant was liable only in respect of the portion occupied by him ; (2) that the apportionment of rent was to be by yardage in case the whole and the severed portion were of equal value, and by value in case they differed in value, and (3) that the value to be assigned to each portion was not as it was when the original lease was granted but as when the severance took place.

Grimshaw, Baxter and Elliot, Ltd. *v.* Parker.
[1910] 2. K. B. 161.

Stay of execution—Rules of Supreme Court, 1883, *Order, LIX, Rule* 14—*Money 'affected by judgment'—Costs included.*

Construing R. 14 of O. LIX of the Rules of the Supreme Court which prescribed that security should be given for money 'affected by Judgment' before getting an order for stay of execution, the Court held that costs were also affected by Judgment and that security should be given for costs also.

Boaler *v.* Power & others.
[1910] 2. K. B. 229. (C. A)

Bankruptcy—Order—Fraud—Mode of setting aside—Right of bankrupt to set aside.

After a person was adjudicated a bankrupt on the petition of a creditor by the Bankruptcy Court the right to continue his suits in Chancery Court became vested in his Trustee in Bankruptcy. Alleging that the order of adjudication was obtained by fraud of the petitioning creditor, the bankrupt claimed to set aside the order in the Chancery Court and to continue the actions there in his own name.

Held (1) that so long as the order of adjudication remained in force he had no *locus standi* in respect of the actions in Chancery, and (2) that the only mode of setting aside that order was by taking proceedings in the Bankruptcy Court itself on the ground of fraud, collusion, etc.

Chissold *v.* Crutchley. [1910] 2 K. B. 244 (C. A.).

Judgment-debt—Actual satisfaction—Attachment after—Trespass.

After satisfaction of a decree, the decree becomes null and void and no execution can issue on the footing of the decree. Therefore if attachment is made in ignorance of the satisfaction, it is trespass for which those who obtain the attachment are liable.

[Judgment of the Original Court in (1910) 1. K. B. 374—digested in XX, M. L. J. 191, reversed].

In re **Peckham, Dulwich and Crystal Palace Tramways Bill.** [1910] 2 Ch 1. (C. A.).

Tramway Company—Deposit—Transfer of duty to another Company—"Failure to complete."

A Company obtained Parliamentary powers for the construction of certain tramways and made a deposit which, under the Act conferring upon the Company the power to construct, was to be applied for the benefit of creditors if the work was not completed within a certain time. By the time the period fixed expired, another Act was passed by which the duties and powers of the Tramway Company devolved upon the London County Council.

Held: that the Tramway Company had failed to complete the undertaking within the meaning of the statute and the

deposit was to be distributed among the creditors as directed therein.

Stourcliffe Estates Company, Ld. *v.* **Corporation of Bournemouth.** [1910] 2. Ch. 12 (C. A.).

Corporation authorised to acquire land for park—Restrictive covenant—Authority to enter into.

There is nothing to prevent a corporation which is authorised by law to acquire land for being used as a public park from entering into a covenant with the seller restricting the erection of buildings on the site, provided that such restriction in no way precludes the corporation from using it as a park though it might prevent the corporation from exercising certain ancillary and subsidiary powers with which they have been entrusted by the legislature, but the exercise of which is not imperative for the purposes for which the land is acquired but permissive only, *e. g.*, the erection of latrines, libraries, museum, &c.

In re **Davies and Kent's Contract.** [1910] 2 Ch. 35 (C.A.)

Gift over, dependent on the exercise of power—Power as distinguished from trust—Perpetuities.

A gift over, dependent upon the exercise of a power of appointment which may be, but has not been, exercised in such way as to offend against the rule against perpetuities is not necessarily bad. The creation of a power is altogether a different thing from the creation of a trust, a trust not being created until the power is exercised. The document exercising the power must be read into the will or other document creating it, and then only it can finally be determined whether the gift over is good or void for perpetuity.

In re **Boxer : Morris** *v.* **Moore.** [1910] 2 Ch. 69.

Will—Direction to raise probate duty—Not direction to raise estate duty.

A will directed the trustees to raise the probate duty payable on certain consols belonging to the testatrix and to distribute the balance among certain specific legatees. At the date of the death of the testatrix, probate duty was no longer in existence, estate duty having taken its place.

Held: estate duty being not merely a substitute for the probate duty but a duty of far wider scope, it was impossible to hold that the direction to raise probate duty would authorise the raising of the estate duty and as such the direction was wholly inoperative.

Brailey *v.* Rhodesia Consolidated, Limited.

[1910] 2 Ch. 95.

Companies Act, 1862, *S.* 161—*Liquidator—Waiver of irregularity in notice by dissentient member.*

Under S.158 of the Companies Ordnance, 1895 of Southern Rhodesia (similar to S. 161 of the Companies Act 1862) a dissentient shareholder has to give notice of dissent at the registered office of the Company within seven days of the date of the meeting resolving on a voluntary winding up of the Company and the transfer of the assests to a new Company. A dissentient shareholder gave notice of dissent to the liquidator not at the registered office of the Company but at the London office which was, however, accepted by the liquidator. *Held* : the Company was bound by the waiver of the irregularity by the liquidator and the notice of dissent was, therefore, perfectly good.

JOTTINGS AND CUTTINGS.

Mr. Lloyd-George and the Law Society.—The PRESIDENT said that, instead of submitting at once the accounts and the annual report, it would be more convenient for him to call upon Mr. Ellett to move, on behalf of the Council, the resolution, of which the members had been given notice.

MR. ELLETT, who was received with loud cheers, moved: 'That this meeting protests against the attack made upon the Society by the Chancellor of the Exchequer in his speech in the House of Commons upon the third reading of the Consolidated Fund (2) Bill on the 15th June, 1910, and declares that the allegation made by him in that speech to the effect that the Society's opposition to proposals in Parliament has been uniformly based on a selfish desire to maintain professional charges in disregard of the public interest is unfounded in fact, and is an unjust aspersion upon the honour of the profession of which

he is a member.' He said it was not with any feeling of pleasure that he rose to move the resolution. He shared the feeling of the Council that they had a duty to perform—(Cheers)—and he confessed that he regarded it as an unpleasant duty. It was not that the Society object to fair criticism—that they always welcomed. It was not that they grudged the dramatist or the novelist the enjoyment they derived from their old friend the 'stage attorney.' (Laughter.) He hoped they were as able as their neighbours to enjoy a joke; but when a Cabinet Minister, himself a member of the Society, speaking in the House of Commons, imputed to the Society, in its action with reference to legislation, sordid and contemptible motives, he thought it was time for them to protest. (Loud Cheers.) The Council had thought it to be their duty to give the members of the Society the earliest possible opportunity of recording their protest and denying publicly the charge thus publicly made. (Cheers.) The circumstances in which the charge was made were these. On the 15th of last month, while the Consolidated Fund Bill was on for third reading in the House of Commons, the occasion was taken by some honourable members to criticise the working of the Finance Act, and especially the Somerset House Regulations under the Act with reference to the increment duty. In the course of that discussion reference was made to a case, spoken of as Emmott's case, in which some solicitors had written to an honourable member giving the facts of the case, where difficulty had been occasioned by the working of the Act, and mentioning an opinion which had been given by the Council of the Society that the expenses occasioned by compliance with the Somerset House Regulations were expenses payable by the vendor or lessor, as the case might be, and that they were not covered by the authorised scale. That opinion was given by the Council of the Society in the ordinary course of its business without any reference whatever to the *pros* or *cons* of the Finance Act. A number of members had written to ask what their duty was with reference to these extraordinary charges, and the Council expressed their opinion, and that was quoted by the solicitor referred to, and the Council had nothing to do with the question discussed in the House of Commons. Thereupon Mr. Lloyd-George, in the course of his reply, used these

words: 'I know something more than the honourable gentleman about the Law Society, and I have never seen a bill for the reform of the Law, whether brought in by a Liberal Government or a Conservative Government, that the Law Society did not oppose if it was to have the effect of reducing the charges in the profession to which I have the honour to belong. Take the case of the bill introduced for the registration of title. The Law Society fought it just as hard as they fought the Budget, and for the same reason, and the Law Society knows perfectly well that in the long run the effect of registering every particular of this kind in a great national registry will be to simplify the transfer of land.' (Cries of 'Shame.') That was Mr. Lloyd-George's statement in the House in reply to the criticism which had been offered. First, there was a general charge that the Law Society opposed every measure of law reform if it interfered with their remuneration: and, secondly, there were specific charges, one that the Society were opposed to the registration of title, and the other that they fought the Budget, and fought it because of costs. (Laughter.)

THE SOCIETY AND THE BUDGET.

It was inferentially only that the charge with reference to the Budget was made. It took two forms: first, that the Society fought the Budget hard; and, secondly, that they did so because it interfered with their charges. The Society never did oppose the Budget in the sense in which they had often opposed other measures. (Hear, hear). The usual and proper course when they wished to oppose a bill was to petition against it, and to endeavour to bring all the Parliamentary influence they could to bear, so that members in the House might oppose the measure. With reference to the Budget they did nothing of the kind. They did, it was true, express their opinion that the measure was in some respects unworkable and in some respects would be harsh in its operation, and he thought they were perfectly entitled to express that opinion. But there was an end of it. They took no active steps in the sense of Parliamentary action to oppose the Budget. Therefore when Mr. Lloyd-George spoke of their having fought the Budget hard he was speaking contrary to the fact. (Cheers). What the Council did with reference to the Budget was this. As soon as

the bill was introduced it was referred, in the ordinary course of their practice, to a committee. That committee considered the bill, and issued an elaborate report, which the Council circulated among the members and sent to the Press. That it was of value was proved by the fact that many of its suggestions were adopted before the bill was passed. Therefore their action in that respect was directed in the public interest, and had nothing to do with their own interests. The last thing the Council had thought of in dealing with the bill was the question of costs, because he imagined that if they had really had the desire to look at the question from the point of view of costs, then the passing of an Act of this kind, bristling as it did with difficulties which must at some stage or other be settled by legislation, would be, if he might use the term, a favourable lawyer's measure. (Hear, hear). But later Mr. Lloyd-George gave a more offensive turn to the statement, when he asked : 'Does the honourable member really mean that the Law Society will get up a great agitation against a bill that increases the charges of the lawyer by three guineas?' the clear implication of that being that, whatever their opinion of the bill might be, however bad they might think it, however prejudicial to the public interest they thought it to be, that if it would add three guineas to the money that was going into their pockets, they would not oppose it, but support it. That was a gross imputation to make upon the honour of the profession. (Prolonged Cheers).

OPPOSITION TO OFFICIALISM.

Now he came to the specific charges. The first was that the Society opposed registration of title. It was perfectly true that they always had opposed the compulsion of land owners under the present system. They thought that the system was a bad one, and they thought it unfair to force it upon the public whether they wanted it or not. (Cheers). That was the attitude they had always taken. It was the attitude which they, as practical people who knew a great deal more about the matter than a great many others who talked about it, thought it right to take, and it was an attitude they had a perfect right to take. But whether they were right or wrong, they regarded that question now as being *sub judice.* (Hear, hear). The President, at a recent meeting of the Society,

stopped discussion on that ground, and he could only wish that the Chancellor of the Exchequer had observed the same caution. In speaking on the assumption that compulsory registration of title under the present system was a good thing, he was begging the whole question, which the Royal Commission had got to settle. Then the Chancellor of the Exchequer went on to say: 'The Law Society has always opposed every bill of that kind.' He must mean, of course, every bill which from his point of view was a good one. (Laughter.) 'They have opposed the Public Trustee Act, Registration of Title, Middlesex Registry, and everything else. They opposed the simplification of bankruptcy proposed by the right hon. member for West Birmingham, and they were always opposed to such proposals.' He would take the first in his list, the 'Public Trustee Act.' The Public Trustee question came to the front in 1895, when a report was made by a Select Committee of the House of Commons, in which they very carefully dealt with the two systems which had been suggested to them. One was the official system; known as the New Zealand system, which was practically what had been put in force under the Public Trustee Act. The other was the Scottish system of judicial factors. The Select Committee of the House of Commons rejected the official system, and reported in favour of the Scottish system. Upon that the Judicial Trustee Act of 1896 was passed. There was never any opposition by the Council to that Act; on the contrary, they had recommended the system, because they believed that it met the real needs of the case. The matter might have remained there, since that Act very well covered the ground, but those who desired the imposition of an official system, the creation of a new public department, the creation of new patronage, wanted the Public Trustee Act. The Council certainly did oppose that Act, but they opposed it not as opponents of law reform, for they did not believe that it was a law reform. They opposed it because in their opinion there were better modes of managing trusts than that which could be done through an official trustee. (Cheers.) But whether their opinion was right or wrong the public would at all events judge and the public might yet, for all he knew, prefer their system to that of the Public Trustee Act. The next on the list was 'Middlesex Registry,' and it was difficult to say what the Chancellor

of the Exchequer meant. (Laughter.) 'Middlesex Registry' was, he imagined, in force before the Chancellor of the Exchequer or any of those present were in existence. What he imagined the Chancellor of the Exchequer meant was the bill which sbsequently became the Act of 1891, and if he had wanted to sing the praise of the Law Society he should not have wished for any better text than this question of Middlesex Registration. What was the attitude of the Council of the Law Society on this point? Before any legislation was proposed, when there were great anomalies and abuses in the office, the Council supported the late Mr. Munton in attacking in the Courts of law those anomalies and the excessive fees that were then charged. That was the attitude of the Council towards the Middlesex Registry, and that, he took it, was in the interest of the public, and not in their own interest. Then came that bill of 1891, which was introduced on the death of Lord Truro, who had held the office of Registrar as a sinecure office for very many years and had drawn a large sum from the fees paid by the public. The Council did not oppose the bill: on the contrary, they assisted the Registrar in preparing the rules for carrying the Act into operation. So that the charge that the Society opposed 'Middlesex Registry' was not true in any sense that he knew—(Cheers); in fact, he was somewhat puzzled to know in what sense the Chancellor of the Exchequer made the charge. Perhaps he was thinking of this: the Council expressed their opinion, as they had a right to do, that when the opportunity for a change came by the death of Lord Truro, these fees should be reduced in the interest of the public; but the Government kept up the fees, and transferred the profits of the office to their bantling, the Land Registry. (Cheers and Laughter.) He believed it could hardly be thought that the Society had any need to fear criticism on the subject of the Middlesex Registry. The last specific charge was that the Society opposed the simplification of bankruptcy proposed by Mr. Chamberlain. There, again, the Chancellor of the Exchequer was very unfortunate in his facts. (Laughter.) The Council did not oppose the measure at all. What happened was that at a very early stage of the matter Mr. Chamberlain asked to receive a deputation from the Council at the Board of Trade to discuss the question with him. The Council responded

to that invitation, and subsequently the draft bill was submitted to them and they made a number of suggestions, many of which were adopted. In the course of the passage of that bill through the House it was supported by Mr. Gregory who was a member of the Council and the mouth-piece of the Council at the time, and it was also supported by Lord Wolverhampton (then Mr. Fowler.) (Cheers.) What the Chancellor of the Exchequer really meant when he said the Council opposed the Bankruptcy Act, 1883, he confesssd he did not understand. He had dealt with all the specific allegations, and he would now refer to the general charge. 'I know something more than the honourable gentleman about the Law Society, and I have never seen a bill for the reform of the law, whether brought in by a Liberal Government or a Conservative Government, that the Law Society did not oppose if it was to have the effect of reducing the charges of the profession.' That was the drag-net clause. It was to be observed with some comfort that the Society were not, at all events, accused of political party action in the matter, because it was said they were perfectly impartial in their opposition. (Laughter). And he might also say in passing that he had yet to learn that it was a sin for any body of men to take reasonable and proper steps for protecting their own interests; he had yet to learn that it was wrong on the part of the Law Society to defend the small privileges in respect of which they were heavily taxed. (Cheers). What other society would not do the same? He affirmed, however, that the Law Society never had opposed, and he hoped it never would oppose, any measure which was really for the public benefit solely on the ground of its bearing upon their own professsion. The whole charge, he unhesitatingly asserted, was unfounded. (Loud Cheers).

THE SOCIETY AND LAW REFORM.

The record of the Law Society with reference to law reform was a good record. It had been recognised by Statesmen, by Judges, by the Bar, and by the Press. It was written on the Statute Book. Let them take land law reform. Who had been the real originators of modern land law reform? It was the Society. As far back as 1860 Mr. Cookson, then the President of the Society, laid down in a very

able paper the broad lines on which land law reform should proceed, and it would be well if those who called themselves land law reformers now-a-days would read and take to heart the admirable suggestions the paper contained. Coming to 1881, when the Conveyancing Act and the Settled Lands Act were introduced, the genesis of these great measures was to be found in an address of a President of the Society, Mr. Nathaniel Tertius Lawrence, and the Society had throughout supported in every way those great measures, which had done so much to get rid of unnecessary forms and verbiage and to reduce the expense of deeds, and thereby, the Chancellor notwithstanding, to reduce the remuneration of solicitors. Since then a variety of measures for simplifying the conveyancing system had been from time to time actually prepared and promoted by the Society. So recently as 1906 there were three bills prepared which passed the House of Lords, where due recognition was given to their authorship, and one of these bills was a bill drafted by Mr. Wolstenholme, which would have gone far, he thought, to settle the question of the transfer of land in a broad and statesmanlike manner. (Hear, hear). Turning to the Common Law side, the Council took an active part in aiding and supporting and getting through Parliament those great reforms which were embodied in the Common Law Procedure Acts of 1852 and 1854. Surely these were measures not for the putting of money into solicitors' pockets, but for facilitating litigation, reducing unnecessary costs, and promoting the interests of the public. (Cheers.) In 1851 a report of the Society led to the abolition of the office of Master in Chancery, which was a clog on procedure and the occasion of unnecessary expense. The Society took an active part in reforming the old probate and proctorial system, and the part which the Society took in these matters was all directed to the interests of the public. One of the most active and hard working members of the Judicature Commission, the forerunner of those great Judicature Acts which had done so much towards simplifying and putting on a better basis the laws of this country, was Sir John Hollams, who was aided throughout by the Council of the Society. The object of the Judicature Act was the simplification and the cheapening of procedure, and that reduced costs, and, of necessity, reduced the profits of the

profession; but, nevertheless, in the public interest, it was supported by the Society. (Cheers.) He had omitted to mention in reference to land law reform that the Council were still engaged in the promotion of valuable measures for the amendment of the conveyancing system, and that in that they were most ably and energetically assisted by Mr. Hills, a member of the Council.

County Court Reform.—The County Courts Acts at all events simplified procedure in regard to the recovery of debts. The earliest County Courts measure, the Small Debts Bill, emanated, he understood, from the Society of Gentlemen Practisers, which existed before the Law Society took its rise. He could speak positively as regarded the County Courts Acts for a great many years past, and every one of them had been promoted or assisted by the Society. The Society had endeavoured to extend the jurisdiction of the County Courts, to simplify its procedure, and to lessen its expenses—(Cheers)—and it had, in the Act of 1903, the valuable services of Sir Albert Rollit, without which the Act would not have been passed. It was not true that the Society was opposed to law reforms. (Cheers.) It was opposed to unnecessary officialism, because it considered that it was undesirable in the public interest that the private business of the inhabitants of this country should be conducted by Government Departments. (Cheers.) He claimed that the Society was a true law reformer. The members of the Council spent their time and the money of the Society in promoting measures or in opposing measures, as the case might be, and in bringing what influence they could to bear upon legislation, and that in the public interest. He did not believe there was another body of men which gave so much time and money to the public service as the Society did. At all events, he was sure that no important reform in legal procedure during the last half-century had taken place which had not in some way received the support of the Society. (Cheers.) Those were the facts. They bore out the resolution, and he thought they justified him in saying that the charge they had come there to meet was a gratuitous and unjust one. (Prolonged cheers.) It was unnecessary to use, and he hoped they would not use, in the course of the discussion, strong or vituperative language. The facts were quite strong enough by themselves. He had been wondering under what conditions the

Chancellor of the Exchequer could have been led into making these charges. It was possible, of course, that owing to the multiplicity of his other engagements he might have been unaware of the important and useful part the Society had taken with reference to measures of law reform. It was possible that he might have been led into using the language in the heat of debate. Whether it was the one or the other, he ventured to say that it would be a dignified thing if the Chancellor of the Exchequer were to acknowledge his error. There would be no loss of dignity in doing that. On the contrary the higher and more distinguished the office which he held, the more reason why he should take an early opportunity of receding from a position which was an absolutely untenable one. At any rate, if the meeting passed the resolution they would have done their duty by putting on record their protest and their denial. (Loud and continued Cheers.)

MR. BEALE'S SPEECH.

Mr. G. S. BEALE, in seconding the resolution, said he shared with Mr. Ellett the deep regret that it should be necessary for the Society to repel such an attack made upon it by one of its own members, but the charge was explicit and unmistakable, and it was their duty to meet it. He would not, after Mr. Ellett's able and exhaustive speech, repeat what he had said. On the question of the action of the Council in dealing with projects of legislation or law reform, he did not think it was necessary for them to do more than to refer to the annual reports which the Council had made year by year. (Cheers.) They did not work in the dark. They told the members exactly in the annual reports what had been done during the past year, and nothing would be found in them which would in any way support the charge which the Chancellor of the Exchequer had made against the Society. (Cheers.) The one statement which they did not attempt to controvert was that they opposed the Land Transfer Bill. They did oppose it, and while he did not want to say anything that could be thought to be dealing with a subject which was *sub judice*, he did wish to say that it was admitted that outside the compulsory area the Act had proved a dead letter, and that if the Chancellor of the Exchequer believed that within the compulsory area that Act had operated to the benefit of land-

owners and saved them trouble and expense, then he was alone, or very nearly alone, in that opinion. (Cheers.) He thought it was a little curious that this charge against the Law Society should have followed so very closely, within a very few weeks, upon the retirement from the Government of the Chancellor's colleague, Lord Wolverhampton—(Cheers)—who had been an active and honoured member of the Council for very many years, whose advice the Council had been accustomed to obtain in dealing with Parliamentary matters, and who must, therefore, be included in this general condemnation. He hoped that whether this motion commended itself to them or not it would be discussed purely on its merits, without reference to any other outside considerations, whether political or pictorial. (Laughter.) One could not but hope, looking at the very trivial cause which gave rise to this discussion in the House of Commons, that the Chancellor of the Exchequer did not realise that the action of the Council on this trivial incident was taken by the Council, or rather by a committee of the Council, in the ordinary course of its business, doing its duty to the members without a particle of partisanship. (Cheers.) He could not help thinking that his remarks must have been made rather in the heat of Parliamentary discussion, which sometimes became acrimonious, and he could quite understand that when a man was irritated by debate he would say rather what first came into his head than express his considered views. He could not help hoping that it might have been a hasty expression on the part of the Chancellor of the Exchequer, which, as Mr. Ellett had said, it would be honourable to him and to the Society if he were to withdraw. He hoped that might be so. The Society did not want to put themselves in opposition to him or to anybody else, but he did say that if it was the considered opinion of the Chancellor of the Exchequer that the action of the Society and its elected representatives in regard to legislation was influenced by professional greed apart from the interests of their clients and of the public, then, although the Chancellor of the Exchequer had said in that Hall that he was proud to belong to the profession, he doubted if, under those conditions—but those conditions alone,—the Society would be proud to consider him a member. (Prolonged Cheers.)

MR. J. S. RUBINSTEIN, in supporting the resolution, said he thought that the Council had hardly done itself justice, because when the Chancellor of the Exchequer referred to the Society as opposing the compulsory registration of title, he apparently overlooked the fact that the Act of 1897 was intended to be an experimental one, and that it was agreed to by the Council as a compromise. The Council said: 'Yes; you believe in the system. We do not; but by all means try it in one county for a limited period.' The Council were entitled to take the credit of the concession they made to the authorities, though he thought that they should have stuck to their guns.

THE CHANCELLOR OF THE EXCHEQUER'S SILENCE.

MR. BOURCHIER HAWKSLEY asked whether any communication had been made to the Chancellor of the Exchequer. He thought that should have been done before the meeting passed this very drastic resolution.

The PRESIDENT said the speech of the Chancellor of the Exchequer was made in the House of Commons, and there was no opportunity of answering him there. The Council sent him a copy of the resolution which they proposed to move in the Hall and it was accompanied by a personal letter from himself, as he had the pleasure of his acquaintance, telling him how much he regretted that such a resolution was to be moved during his presidency, and rather inviting by the words he used some communication from him. The Chancellor of the Exchequer had not replied.

MR. HAWKSLEY, who spoke amid much interruption, said that if they took so serious a view of Mr. Lloyd-George's offhand speech as to suggest that they would rather not have him as a member, he ventured to submit that it would not be unreasonable to postpone the further consideration of the matter until the Chancellor of the Exchequer was, at all events, invited to answer the charge. It was quite obvious that the Chancellor of the Exchequer, having in view what he said in that Hall some months ago, had a regard for the Society of which he was a member. ('No.') He suggested that before a vote of this character was passed, the Chancellor of the Exchequer should have an opportunity of answering. It was perfectly well known that the

Chancellor of the Exchequer could not be present at the meeting, for the very good reason that the Budget was being discussed at the moment. ('Vote, vote.') He did not propose to move an amendment, but he did venture to say, as a member of the rank-and-file of the profession, that they would not do themselves any good if they attached to what, after all, was a passing statement in the House of Commons, so much weight as to pass what some of them thought was a very serious vote of censure. (Hear, hear.) In one sense they ought really to be obliged to the Chancellor of the Exchequer for having made the statement, as it had enabled the members to hear the eloquent and able speech of Mr. Ellett. He appealed earnestly to the members to think once, and twice, and thrice before passing such a vote of censure. The charge, after all, was that the Society always opposed any bill which was supposed to affect their own pockets. Who cared about that? (Laughter.) There was no profession—the legal, the clerical, or the medical—which did not, as Mr. Ellett had said, look after itself. That was the whole effect of the Chancellor of the Exchequer's speech. ('Vote, vote.')

Mr. BELL asked the President when he sent his letter to the Chancellor of the Exchequer.

The PRESIDENT said he sent his letter the very day the resolution was printed; he had the first notice of it.

THE PREVIOUS QUESTION MOVED.

Mr. BELL moved that the meeting do proceed to the next business. He ventured, he said, to think that the Chancellor of the Exchequer never intended that the observations should bear the meaning which was attached to them in the resolution. ('Vote, vote.') Nothing was said by him about attacking the honour of the profession. The Chanceller of the Exchequer said: 'I have never seen a bill for the reform of the law, whether brought in by a Liberal Government or a Conservative Government, that the Law Society did not oppose if it was to have the effect of reducing the charges in the profession to which I have the honour to belong.' Would the Chancellor of the Exchequer have used that last phrase if he belonged to a profession which he was stigmatising as having uniformly the selfish desire to retain its professional charges in disregard of the public interest? (Laughter and cries of 'Time, time.') He

moved the previous question for the purpose of allowing some sort of expression of opinion without the definite vote of censure being passed. It might come to the ears of the Chancellor of the Exchequer, and he might remove an impression, which he ventured to say was erroneous, that he ever intended to cast a slur upon the profession to which, as he himself stated he had the honour to belong. (Laughter.)

MR. LYELL seconded the motion, which was rejected by an overwhelming majority, only eight votes being given in its favour.

Mr. SYDNEY MORSE moved as an amendment: 'That this meeting, being of opinion that the remarks of the Chancellor of the Exchequer upon the third reading of the Consolidated Fund (2) Bill in the House of Commons on the 15th June, 1910, as to the action of the Society in regard to propositions in Parliament are not calculated to influence any impartial person, expresses its confidence in the Council, and decides to proceed to the next business.'

The PRESIDENT ruled that the motion was a repetition of Mr. Bell's motion, and therefore out of order.

MR. MORSE observed that it was absolutely beneath the dignity of the Society to notice the remarks of the Chancellor of the Exchequer. Everybody knew Mr. Lloyd-George's inaccuracy—to put it no higher than that. (Laughter.) All the world knew that at a pinch he would say anything. (Laughter.) It was a pity that the Society should think it necessary to pass the resolution, because no one outside the Society would take any notice of what Mr. Lloyd-George said. They would do best by treating his language with silent contempt.

MR. CHARLES FORD, who sympathised with the suggestion of the last speaker, said they were thirsting for the blood of the Chancellor of the Exchequer. (Laughter.) Was the game worth the candle? It was beneath the dignity of a profession like theirs, because a mere politician talked in a random, reckless way, to meet there with a desire to swallow him whole. (Laughter.)

MR. BLAGDEN said he opposed the resolution for the reason that he thought it was not for the members of the Society to

whitewash themselves. ('Vote, vote.') Surely it was the duty of every profession to see that its charges were not infringed upon. ('Vote, vote.') They ought not to behave like a meeting of whipped puppies whining in concert. (Laughter.)

Mr. F. M. GUEDALLA, who like all the opponents of the resolution, was heard with much impatience, thought that Mr. Lloyd-George was thinking of the continued and persistent hostility of the Society to schemes of reform in many legal matters for many years past, though he went too far in suggesting that that opposition was inspired by any prejudice. He himself was second to none in his admiration for members of the Council. ('Sit down.') They might all disagree about matters, but at all events they might respect one another—(Laughter)—and he thought that the Council might respect Mr. Lloyd-George's views, however much they might disagree with them. Mr. Ellett had read a long list of reforms in which the Council had taken a good part: Mr. Lloyd-George, no doubt, could produce quite a different list; but whether they were in agreement or in disagreement, the Society, with its limited membership—('Oh')—was casting a reflection upon itself when it passed a condemnation of the most distinguished solicitor of the day. (Laughter.)

MR. H. R. REYNOLDS said he should have thought it would have been obvious to the Chancellor of the Exchequer—it was very obvious to a great many solicitors—that contentious legislation was the very best thing for promoting litigation and putting money into the pockets of the profession. The Council could not, therefore, be accused of undue regard for the interests of the pockets of solicitors if they opposed legislation which was likely to produce such an effect.

THE PRESIDENT'S SPEECH.

The PRESIDENT denied that he had come there with the desire of swallowing the Chancellor of the Exchequer whole. (Laughter.) On the contrary, he came there with very great regret to take the chair at a meeting at which he felt that such a resolution was absolutely necessary. (Cheers.) They were not considering the wisdom, or the want of wisdom, shown by the Society in the action they had taken from time to time in regard to legislation, though he thought their record was a good one.

They were not there to discuss the justice, or injustice, of the Finance Act, and there was no question of party politics in that Hall. Indeed, the one thing the Chancellor of the Exchequer gave them credit for was that they hit all round, whether a Liberal or a Conservative Government was in power.. They were there to meet a charge, made by a member of their own Society against the body to which he belonged, of uniformly regulating their Parliamentary action by the purely selfish consideration whether it would increase or diminish their legal charges. (Hear, hear.) He ventured to say if there was any doubt about the meaning of the words used by Mr. Lloyd-George at the beginning of his statement, he made it perfectly clear what was his meaning when he said it was impossible that the Society should oppose the Finance Act if it would add three guineas to their charges. That could but mean that they were actuated in the action they had taken in Parliament by selfish considerations. (Cheers.) Mr. Lloyd-George had been twenty-six years in practice; he became a member of the Society three years ago. (Laughter.) He wondered when Mr. Lloyd-George ascertained that the uniform action of the Society was so discreditable, whether it was in his twenty-three years of practice before he joined the Society or whether it was since he became a member that he had arrived at such a conclusion. He sat next Mr. Lloyd-George when he was last in that Hall, when he expressed the pride it was to him to be there, and testified to the respect with which he regarded the senior members of the profession who were gathered round him, and expressed the great satisfaction it gave him to have their good opinion. Was not the simple answer to the suggestion that he made these unjust aspersions in the heat of the moment and in the irritation of Parliamentary debate, without weighing his words, that a responsible Minister of the Crown ought to weigh his words? (Prolonged Cheers.) Something had been said about Mr. Lloyd-George being given the opportunity of a reply. Mr. Lloyd-George had not given him the chance of a reply because he had not the honour of sitting in the House. If he had, Mr. Lloyd-George would have had a reply on the spur of the moment. But he was a member of the Society, and the notice of motion which was sent him was to give him the opportunity of being present and explaining his words. He

believed he was right in saying that Mr. Lloyd-George put down the work which was detaining him at the House of Commons on the paper only two days ago, and that if he had desired to attend the meeting he could have done so. He did not want to say a word to excite their feelings. He could hardly trust himself to speak about the matter, because to be charged, at the end of his career as President, with desiring merely to increase his remuneration without any consideration for his clients and the public was most unpleasant. It was a charge which he thought they could not with credit to themselves and honour to the profession pass over. (Cheers.) If they passed the resolution, he trusted that Mr. Lloyd-George would take the course which was always open to an honourable man and would withdraw the charge of unworthy motives made against the profession. (Loud and continued Cheers.)

The motion was carried, only eight votes being given against it.

***

The Art of Cross-Examination.—(Continued).—The golden rule of all cross-examinations is, never lose your temper. There is no time in the practice of the profession, there is no incident in the history of our lives that requires a more calm, a more cool, and collected mental condition, than that in which the cross-examiner is placed. And it might be that I can go on very usefully with a series of "Don'ts" in this connection, but I have only one or two "don'ts" noted, and these are:—Don't expect a witness to fall into any trap, no matter how skilfully it may be prepared. Don't expect that you are going to smash any witness—and when I use the word "smash" I use it in the ordinary colloquial term spoken of by lawyers in conducting a vigorous cross-examination. The man who goes into the Court with his brief, I care not how eminent a counsel he may be, I care not what his experience may be, I care not how good a case he may have, if he goes into Court with the idea in his head that he is going to smash a witness by cross-examination, that man retires from the field; defeated in nine cases out of ten, and perhaps in a larger percentage. Witnesses are knowing people; they are crafty; they know more about their affairs and what they are talking about than you or I do; they have lived with them; they are people who are very quick of observation, and they have

a certain amount of cunning, and that cunning, the most careful counsel sometimes is unable to circumvent, even when the Court and when the Counsel are both convinced that the witness is not telling the truth.

* * * *

Cardinal Rules of Cross-Examination.—The first is and that is largely covered by some things I have already said—the examining counsel must have a continuity and concentration of thought. If he has not that, he cannot cross-examine. By concentration I mean that which eliminates and excludes every other thought excepting the subject in hand, and the witness he is dealing with. By continuity, I mean that it is not in broken patches, that his concentration is not fixed here this moment and somewhere else the next, but there should be continuity throughout the whole of his cross-examination. And that leads to the second rule which is: Never let the witness get away with you. You will see a witness who is being well cross-examined, but the witness, whether through craft or unintentionally, leads off into some other branch, and counsel follows him into that branch, and the counsel's work to the extent to which he had got before he was led away, is practically nullified. If he had not permitted himself to be led away, if he had kept his witness to the point, if he had not allowed the witness to get the mastery of him and take him into some side issue, the chances are he would have done good work, but the moment the break is made, the moment the man gets the whip-hand, and takes you away into a side issue, your continuity is broken, your concentration is weakened, and the opportunity is gone that you perhaps have been striving to attain for half an hour with that particular witness. Then the third cardinal rule that I should say should be crystallized is : Don't begin to cross-examine upon any point unless you have good ground for gaining that point, and stop absolutely short when you gain it. Let me illustrate what I mean by that: A witness is called, and he is asked if he said a certain thing upon a certain occasion. In many, many cases the answer of the witness is: "No. I don't remember that I did." He asks again : "Well, think it over ; didn't you say so and so?" "I don't remember. I don't remember anything about it." Counsel goes about three questions further, and the man

says : "No, I never said it." Now, that is a thing that happens in almost every trial. If counsel had been satisfied to take the want of memory, whilst it may have been against the contention of the counsel, it may have been against his side of the case, it is infinitely better for counsel that a witness should not remember than that he should remember and swear point blank that he never said such a thing.

The fourth rule is important as regards policy. It is one I have given a good deal of thought to, because one does not like to announce principles without consideration. I can only say I have tried it in my own cases, and when I have not done it, I have always thought that I would have been better off if I had taken the rule and followed it, and that is this : Always attack your witness in the weakest point at the opening, unless it is some complicated matter involving long accounts or something of that kind. Always attack your witness where he is least prepared or protected. And the reason for that, when you come to think of it, is very apparent. When a cross-examiner gets up to put his questions, the witness is more or less nervous. In many cases he has been told: "Oh, well, wait until John Smith or James Jones, the eminent K. C., gets hold of you; he will turn you inside out in three minutes." Well, Mr. Jones gets up, and the witness has some apprehension, he is a bit nervous; he is unused to your tone of voice, and there is a complete and sudden change of style in the method of cross-examining from the method of the examination-in-chief. There is no time at all for him to get his evidence in mind, and the first moment that you strike the weakest point of his testimony under these conditions, you strike when he is least prepared for it, because in a few minutes, even a nervous witness will regain his confidence, and he feels you are not such a tremendous man after all, that you cannot turn him inside out, that you cannot smash him, and that he can hold his own fairly with you. You ask him the same question in 15 minutes after he has become prepared, and he has everything in his mind; he says "yes" or "no," and "I will explain that to you." And he will at once explain, whereas, if he had been attacked in the first place, and you caught him just at the moment when the sudden change occurred between the methods of examination, you

might have got the answer that you were seeking, and very likely a true answer, because when a witness has his time to think, knowing that he is a witness there in favour of the man who calls him, naturally and without any malevolence or without any wrong-doing on his part, his mind intuitively and unconsciously gets a sudden twist or turn that is very difficult to straighten out.

* * * *

Then let me strongly urge upon the members of the Bar here who take their own cross-examinations, never to attack a man's character unless they have it of record. I do not know how often in the course of my own experience, which has not been altogether limited, I have been told of a state of facts regarding character which my client supposed he was correctly representing to me, but which he was not, and at the trial I have been met with a condition of things on the part of the witness that absolutely turned the Jury in his favour. Therefore, I say, it is important that if you know the record, if you have convictions against the witness, and if they are within two or three months or even within six months, it might be safe to ask him if he had been convicted of a certain offence; but if a man has been convicted 10 or 12 years ago, has served his term in the penitentiary and has come out, and is living a clean, respectable life, no counsel will ever advance the interests of his client by asking that man if he was ever convicted.

Now let me add one or two words of my own. Remember that cross-examination is a duty we owe to our clients, not a matter of mere personal glory or fame. Remember that regard must be had for the true administration of Justice, and that Justice must not be defeated by improper cross-examination. Remember that we owe an obligation to the State which gives a monopoly to our profession, and that we should render that to the State which enures to the benefit of the public. Remember also that in cross-examination we owe a duty to ourselves, and that we are bound to give the best that is in us in that most difficult art, however we may fail in the result; and so, if we fulfil all these obligations, our names will be re-called as those who lent honour and dignity to our profession; we will be remembered as those who regarded fairness as one of the great elements of

advocacy, and whose talents and genius were not aimed at self-glorification but were used to establish truth, to detect falsehood, to uphold right and justice and to expose the wrong-doings of dishonest men.—*Canada Law Times.*

***

The Evidence of Handwriting Experts.—In connection with the Osborne Cadet Case, the result of which is another instance of the supreme importance of the actions of public departments being subject, on proper occasions, to review by the Courts, Sir Edward Carson has made a powerful attack upon the testimony of experts in handwriting, going the length of suggesting that it should never be admitted. It is easy, of course, to ridicule the pretensions and achievements of some of these witnesses, and Sir Edward Carson is not the only distinguished member of the Bar who has revelled in the task. Here, for instance, is Lord Brampton's account, in his "Reminiscences," of an encounter he once had with Mr. Nethercliffe, the most famous of all the experts in handwriting of his time:—

"When I rose to cross-examine I handed to the expert six slips of paper, each of which was written in a different kind of handwriting. Nethercliffe took out his large pair of spectacles, magnifiers, which he always carried. Then he began to polish them with a great deal of care, saying, as he performed the operation: "I see, Mr. Hawkins, what you are going to try to do. You want to put me in a hole." "I do, Mr. Nethercliffe, and if you are ready for the hole, tell me, were these six pieces of paper written by one hand about the same time?"

He examined them carefully, and after a considerable time answered: "No. They were written at different times and by different hands."

"By different persons, do you say?" "Yes certainly."

"Now, Mr. Nethercliffe, you are in the hole! I wrote them myself this morning at this desk."

To challenge the infallibility of the evidence of experts in handwriting is one thing; to propose, as Sir Edward Carson does, to exclude it altogether is quite another. There are forgery and other cases in which the trained observation of the expert may be of assistance to the Judge and Jury, and there would be

little wisdom in making it a hard-and-fast rule that their evidence shall not be admissible. What is required is a change in the status of these witnesses. Their statements should be regarded as advice rather than as evidence and no Judge or Jury should accept their statements without exercising an independent opinion. This is already the practice of nearly all our Judges and Magistrates, but there have been occasions in recent years on which the practice has not been followed as closley as it might have been.—*The Law Journal.*

***

The Tout System in Tanjore.—Mr. N. K. Ramasawmi Aiyar, now of the Tanjore Bar, has sent us a copy of his letter to the Tanjore Bar Association dealing with two points affecting the profession. The first point raised by him is that steps should be taken to discourage the tout system which apparently is more prevalent in Tanjore than in other places. It is well that attention is paid by the Association to this illegal practice and some joint action taken to root out the practice. His other point is that the Bar Association should resolve that Senior Vakils should raise and fix then minimum fees. This seems somewhat Utopian. We rather think that the Bar Association cannot deal with what appears to be a question for decision among the Senior Vakils themselves.

***

The Case of Savarkar.—The Indian Student Savarkar having caused considerable trouble to the English Courts of Law, appears now to be creating international complications. When it was decided that he must return to India in custody under the Fugitive Offenders Act, 1881, he was put on board the P. & O. Steamer *Morea.* While she lay in the harbour of Marseilles he escaped through the port-hole of a bathroom and swam ashore, only to be seized by a French gendarme and handed over to the detective who had been in charge on the steamer, and he has been carried off to India in the *Morea.* It is now suggested in France that, having reached French soil, Savarkar ought not to have been restored to British custody except after compliance with the terms of the Extradition Treaties, and

that as a political offender he would not be liable to surrender under those treaties.

Considerable difficulties may arise on the conveyance by sea of fugitive criminals in ships which touch at several ports. A writ of *habeas corpus* can be executed on a foreign merchant vessel and on British vessels (56 Geo. III, C. 100, S. 5). It is theoretically possible for a fugitive criminal surrendered by the authorities of one British possession to get a *habeas corpus* at a port in every other British possession at which the vessel touches, whether the merchant vessel in which he is being conveyed is under the British or a foreign flag. So far as foreign mail ships go, provision is made for the making and application of conventions which permit the powers of arrest or execution of process on such vessels while in British ports (54 & 55 Vict. C. 31, S. 4). Members of the crew of a merchant ship deserting in a foreign port are also under international arrangements supplemented as to the King's dominions by statute liable to be recaptured and returned to the ship. But these arrangements and Acts do not apply to passengers, voluntary or involuntary, on such vessels; and as Savarkar actually reached French soil we fear that some arrangement will have to be made with France to justify his trial in India.—*The Law Journal.*

***

Lord Halsbury :—At the annual dinner of the Hardwicke Society, the Lord Chancellor, in proposing the health of Lord Halsbury, said he did not perceive at the present moment any special reason for wishing him health, because he seemed to possess it in abundance. He had some little claim to propose the toast, because ever since he was quite a young man he had invariably received most constant and marked kindness at the hands of Lord Halsbury, not only at the time he was practising at the Bar, but also since he had been in the honourable position of being one of his Judicial colleagues, and also as a colleague in Parliament. He would not say that he had been fortunate enough on the Parliamentary side of his life at all times to meet with the full approval of Lord Halsbury for his humble proceedings. Whenever he had been unfortunate enough to differ from Lord Halsbury he had found the deadly and formidable character of his opposition, but he had never heard an unfair comment, and

he had never known on a single occasion any descent to that pitiful expedient of personal attack which was the only resource of those who were incapable of arguments themselves. The society was a very appropriate place in which to propose the toast, not only because of the old associations and long service of Lord Halsbury in connection with it, but also because the society itself derived its name from perhaps the greatest Chancellor they had had in the last few centuries, and because it was confined to members of the English Bar. Lord Halsbury, while at the Bar, was confronted with some of the most illustrious men that ever practised in the Courts—with Mellish, Karslake, Russell, Benjamin, and others—and he was at all times quite a rival to them at their best. He supposed all members of the English Bar wanted to be great advocates. Some of them, perhaps, would like to be great judges, and he was sure that every one of them would like to be great statesmen, except those who were so already. In regard to the judicial position, he believed the greatest service that their profession rendered to the country was that it was able to provide not only judges for the United Kingdom, but also for all parts of the Empire beyond the Seas. It was in vain that they subdued savage races or that they cast the protection of their sword over those who were down-trodden unless they could also persuade them that their Courts were patient, fearless, and incorruptible, and would not allow wrong to be done to any manner of men. The Bar was also fertile in producing statesmen and in producing politicians, which were not always quite the same thing. They could greet in Lord Halsbury a statesman who had lived in great events and in great scenes, and who had always attracted the respect and admiration of those who differed from him by the courage, conviction, and absolute sincerity with which he had at all times expressed his view as to what was best in the interest of this country. But he thought that while doing honour to Lord Halsbury's career they were thinking less about his great achievements than about the man himself, the central figure in a great profession, to whom they wished many long years of health and happiness.

Lord Halsbury, after acknowledging the kind words of the Lord Chancellor, claimed a very early acquaintance with the

Hardwicke Society. He thought he might say he was one of its founders, and he well remembered the meeting at which they determined upon its name. They regarded the great man whose name they determined to take as being the type of what an English Chancellor should be. Lord Justice Mathew was their first Secretary and the chief songster at their social functions. He could not help thinking that the society had set a good example to those who were endeavouring to fit themselves for their career at the Bar. Mere talking was not eloquence, but the faculty of thinking when they were on their legs was one which was not easily acquired at the moment. The first brief that some very rash person intrusted him with he had before Lord Campbell, and he was called upon in the ordinary course to examine the first witness. One of the things at the Bar that they had to learn was how to examine a witness. It did not come by nature. He was blundering through his first efforts to guide his witness to the question which was about to be determined when he got into a fog—which he supposed anybody would get into—when for the first time he heard his own voice asking questions in court—when he received this sort of encouragement from the Lord Chief Justice, who exclaimed, 'For God's sake, Sir, will you go on?' It had a good effect on him, although he was very angry with the Chief Justice at the time, for he got rid in a great measure of his nervousness. When it had been his duty from time to time to have witnesses before him he considered the question whether the learned Judge was always doing justice when he insisted upon a strict logical reply from a person who had never, perhaps, been examined as a witness before.

The Lord Chief Justice, in replying to the toast, said that there was nothing harder than to learn to be a Judge. He wished they could all follow the example of Lord Halsbury, the best president of any Court before whom he had ever argued. The difficulty in finding the happy mean on the part of the Judge was extremely great. As an old advocate at the Bar, he could say that there was no Judge more difficult to practise before than the absolutely silent one, who never let one know what was passing through his mind. They all knew what it was to practise before the garrulous Judge. To find the happy mean

—for a Judge to let the advocate know his mind and yet not to interrupt the course of the argument—was a very difficult ideal to attain. The reason why His Majesty's Judges commanded respect was, in the first place, because they had the assistance of a free and independent Bar, who insisted on putting their arguments before the Court; and, secondly, because, whatever might be said of them, they did not care two-pence—he would not use any stronger phrase—for public criticism if they felt they were discharging their duties to the best of their ability. He should be very sorry indeed for the day to come when it should be thought that because criticisms were passed upon the Judges in places where they had no power to respond, the Judges themselves should think its necessary to make any public utterance in support of the discharge of their duties.—*The Law Journal.*

***

The Additional Judges Bill.—The Solicitor-General formally moved the third reading of this Bill. Mr. H. Craig said there was no reason why the Judges alone of our Civil Servants should have no age-limit imposed at which they must retire.

Mr. Bottomley said that, enjoying as he did a considerable practice in the Courts, he had had opportunities of watching their proceedings, and had formed the opinion that if a short-hand-writer were appointed to each Court the appointment of additional Judges would be rendered unnecessary. The cost of short-hand-writer in each Court would be infinitesimal compared with the expense entailed by the waste of time which the present system involved.

Mr. J. G. Butcher supported the hon. member's suggestion, and said that its adoption would save a great deal of time and would be of great advantage to those litigants who could not afford to obtain a transcript of a short-hand-writer's notes when they wished to carry a case to the Court of Appeal.

Mr. Gibson Bowles said he was glad that what might have been irritating and extremely offensive debates had been avoided for he could see the time approching when the King's Courts would be the only things which stood between the people and the oppression of a proud and insulting bureaucracy.

Commissioners were making the law, breaking the law, construing the law, and disregarding the law, and a very serious time was approaching for tax-payers.

Mr. Morton said the whole question of the Long Vacation ought to be dealt with before new Judges were appointed. If the present Judges sat for eleven months in the year instead of only eight months there would be no need to increase their number. He moved that the Bill be read a third time that day three months.

Mr. Watt seconded the rejection of the Bill.

Sir Edward Carson said that when the King's Bench adjourned at the end of the month there would be hundreds of cases ready for trial, some of which were begun more than a year ago, which could not be tried. He had many times to advise litigants that it was absolutely useless for them to seek remedy in the Courts owing to the delay that must necessarily occur. He had a letter from a solicitor concerning the case of a man who had been turned out of his place owing to certain charges made against him and was told that he must vindicate himself in the Courts. He believed that that man had a perfect answer, but told him that it would take eight months or a year before his case could be heard, and meanwhile he, his wife, and children would be starving because of the arrears of business. That was not justice; it was a denial of justice. The appointment of the two Judges now proposed would not be a sufficient measure without other reforms. Judges were taken away from the King's Bench Division for a variety of special purposes, and then complaint was made that they did not keep abreast of their ordinary work. Until Judges had their work duly assigned to them, and were instructed not to leave it for other tasks the condition of affairs in the King's Bench Division would never be satisfactory. He was in hopes that the addition of these Judges would enable something of the kind to be done. As regarded the Long Vacation, he thought the time had come when the question of diminishing it might well be considered; and he did not think opposition to the making of any such change required in the public interest would come from those connected with the administration of the law. He believed it would be advantageous to appoint Judges at an earlier age than was customary at present, but he was opposed to fixing an age-limit, which would probably sometimes exclude the most suitable man.

The Solicitor-General said his right hon. friend the Member for Dublin University had said he had had to advise clients not

to bring actions. An instance of the same kind occurred to him before he accepted his present office—and it was not an isolated case—which served to show what might happen when there were not sufficient Judges. A litigant came to him for advice. He had a claim for £12,000. He was not a rich man, and had had to borrow money from his bank to carry on his business. He was anxious to realise this claim and pay off his loan from the bank. He had a perfectly good claim to which there was not the faintest defence. A defence, however, was set up, which entailed five or six months' delay, and his client could not afford to wait because before that time had elapsed his credit might have gone. Realising that, he advised him, notwithstanding that there was no defence to his claim, to compromise, and to accept the 75 per cent. that was offered to him. He did not hesitate to say that that was a scandalous state of things. He only wished to bring it home to hon. members who did not realise it that this was a matter that affected the public, and not the lawyers. The Joint Committee recommended that this particular reform should be carried out at once, and that other reforms should be considered without delay. Those matters were actually under the consideration of those who would have to deal with them, as were also the suggestions made with regard to the circuits, but it was quite impossible to discuss them in the House until they had assumed a somewhat more definite shape. Ample opportunity of discussing them, however, would be given before they were put into execution. He did not purpose to discuss the circuit question. He would only say that for himself he was very much impressed with the desirability, with due regard to economy and the saving of time, of His Majesty's Judges going round the country and bringing home to the minds of the public something of the administration of the law. As to the suggestion that a short-hand note should be taken of the evidence, that did not seem quite germane to the discussion, although it arose naturally in a debate like this. He would point out, however, that it was by no means so simple a matter as some hon. members thought. He had often wished to see a short-hand note, so that the Judge's words and those of witnesses might be recorded as spoken but there was the difficulty that the majority of the cases were begun and concluded on the same day. The

short-hand note, however, was of some use for the Court of Appeal; but there was always a danger that if a case came to a close, there would be no effective note of evidence on which a Judge could rely in case of dispute as to what a witness really did say.

The age limit was not a question which could be dealt with in this Bill. Hon. members who preached economy should re-memember that if a Judge retired, with capacity to perform his work, he received a pension, and another Judge had to be appointed, at a salary of a £ 5,000 a year. At this moment he knew of no Judge who was incapable of performing his duties on account of age. The Judges now on the Bench were as competent to do their work as they had ever been.

The amendment having been negatived, the Bill was read a third time.—*The Law Journal.*

***

Jurymen's fee and Drink.—Mr. Justice Darling, at the Birmingham Assizes, on Monday, said he had received a complaint that after one of the cases was over, and the small fee to which each juryman was entitled was brought by the officer of the Court, one of the Jurymen took up the whole of the money and put it into his pocket, remarking that it was customary to spend it in drink. It was only after a protest from a juryman that his fee was handed over to him, and handed over with very rude remarks upon his not consenting to what was said to be the practice of spending the money in drink. He would like to know if it were true. The foreman admitted picking up the money. His Lordship: 'Tell me what happened.' The foreman said that it had been the practice to pick up the money and give the man in charge of it something, and then to spend the rest or to put it in the poor-box. All his colleagues fell in with the suggestion except one. His Lordship said it was absolutely wrong that any portion of the money should be given to the Usher or any officer of the Court. The money belonged to the Jurymen alone, and if he knew of any officer demanding anything that officer would be dealt with as others had been in London. It was a most improper practice to take the money and treat it as to be spent in drink, and he hoped it would not be repeated. Half the crime they had to deal with at the Assizes was due to people taking too

much drink, and it was a sad state of things if Jurymen there who administered justice and brought people to a proper mode of life the moment they left the Court gave an exhibition of that kind.—*The Law Journal*.

***

The Too Long Vacation.—To-day we enter upon what will probably be the last of the long ten-week autumn vacations. The profession generally has chafed under this enforced breach in its work for a good many years past, and we are not surprised that at last a long suffering member of the Junior Bar has dared, as Mr. Spokes did last Tuesday, to tell a Judge in open Court that 'it is a scandal that the Courts should rise for ten weeks'. This protest was made in reply to an observation of Mr. Justice Bucknill on a scandal of another kind—the putting into the 'short cause' list of actions requiring more or less prolonged investigation, to the detriment of other suitors who desire to have their own very simple cases promptly disposed of. We cannot help thinking that the learned Judge 'put down his foot' as he said, at the wrong place, and that his comment on the retort of counsel was very unconvincing. 'Wait until you're a Judge' said the urbane Judge; 'are you a Member of Parliament?' The holiday requirements of political barristers, and a few busy leaders who are not politicians cannot be allowed to stand in the way of the interests and wishes of the profession generally. And as to our hard-worked Judges, we have it on the best authority that they will not oppose any reasonable shortening of the vacation if the public interest demands that sacrifice at their hands. There is an additional argument here for the abolition of the half-day sittings on Saturdays. The full week-end holiday throughout the year may well be required to maintain the power of efficient work in the Judges, to whom it would be a good equivalent for the longer hours and shorter vacations which the insistent demand for speedy justice imposes on them. If the future reduction of the Long Vacation is not announced next October among the 'other reforms' promised on the appointment of the additional Judges it will be the duty of the Bar Council, or, failing them, of the Bar in general meeting, to join in the oft-repeated resolutions of the Law Society and its Council urging this long-delayed reform, and we do not believe ourselves,

notwithstanding Mr. Justice Bucknill's protest, that the Judges will refuse to give effect to the general demand.—*The Law Journal.*

***

Attire and the Sexes.—A girl, when arrested on a charge of theft, was in male attire, and when before the North London Magistrate the other day inquired whether there was any law to say what a woman should wear. There are now no sumptuary laws, and fashion alone rules the dress of the sexes; but it has been usual to treat as idle and disorderly those persons who go about in the garb of the other sex. There is said to have existed at Common Law the offence of 'travesty,' *i.e.*, the wearing by one sex of the garb of the other, but we can find no authority or case or statute that the wearing of the attire of the opposite sex can of itself now be treated as criminal offence, though the disguise may afford some indication that the wearer is up to no good.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

In two articles in the *Harvard Law Review* (May and June 1910) Mr. Mechem discusses the basis and limits of the Rule relating to the liability of an Undisclosed Principal. The learned writer does not quite accept the principle of subrogation as constituting the basis of a contracting party's right against an undisclosed principal of the other party (*cf.* 18 *Yale Law Journal*, 443). Accepting, however, the existence of the right as too well established, the author considers at some length the extent and basis of the principal exceptions to the rule. The two principal exceptions relate to the cases in which (1) the principal has settled his accounts in the matter with the agent, or (2) the other party has elected to hold the agent only liable.

With reference to the first exception attention is drawn to the different views that have at different times prevailed in the English Courts. The point was whether, to relieve the principal from his liability on this ground, the mere fact that he has paid his agent in respect of the transaction was enough, or was it necessary that he should have been led so to do by the conduct of the other party to the contract. (Compare *Thomson* v.

Davenport [1], *Armstrong* v. *Stokes* [2] with *Heald* v. *Kenworthy* [3], *Irvine* v. *Watson* [4] and (on appeal) *ibid* 414 and *Davison* v. *Donaldson* [5]).

Dealing with the second exception, the author states the different views as to the theory underlying the exception, in the following paragraph:—

Theories of Election.—With reference to this matter of election four views are possible: (1) That the other party unexpectedly finds himself in a situation where he can hold one of two parties liable and he must simply choose between them. (2) That the other party, inasmuch as he has a contract in terms with the agent, will presumptively pursue this obligation, and that therefore some affirmative action is necessary to show that he intends to abandon this for his remedy against the principal. (3) That the other party, as soon as he discovers the existence of the principal, will presumptively look to him rather than to the agent, and that some affirmative act is therefore necessary to show that he prefers to hold the agent. (4) That the other party, having actually dealt with the agent as principal and obtained an obligation against him, but finding unexpectedly that he also has a claim against the principal, intends to make the most of the situation,—to keep and enforce his claims against both until he has obtained satisfaction from one of them or has done something which in fact or in law shows that he has abandoned his claim against one or the other of them.

In determining whether or not any particular acts of the other party to the contract constitute an election to hold the agent alone liable, the writer points out the importance of noting whether the party has or has not, before such acts, become aware of the existence and identity of the principal. The rest of the second article is devoted to a discussion of the case-law as to what acts amount to such election.

Another article in the *Harvard Law Review* (June 1910) deals with 'Mistake of fact as a ground for *Affirmative* Relief', whether by way of (i) rectification or of (ii) rescission. Classi-

1. (1829) 9 B. & C. 78.
2. (1872) L. R. 7 Q. B. 598.
3. (1855) 10 Exch. 739.
4. (1879) 5 Q. B. D. 102.
5. (1882) 9 Q. B. D. 623.

fying mistakes, the author points out that the mistake may (i) with reference to *parties*, be unilateral or mutual, and (ii) with reference to the *subject*, intrinsic or extrinsic. It is only if the mistake is mutual and intrinsic that a party is entitled to relief by way of rescission. But even a unilateral or extrinsic mistake may entitle the mistaken party to such relief if before the contract the other party was aware of the fact that the former was entering into the contract under a mistake. Again where rectification is sought of a deed of *gift*, there is no question of contract and certain mistakes on the part of the donor in the matter of the *writing* of the deed, if clearly established, may, even though unilateral, entitle him to relief. One important distinction between rectification and rescission is that the former is by way of affirmance and the latter by way of disaffirmance of the transaction.

The result of the discussion is summed up in the following propositions :—

1. To be a ground for relief the mistake must relate to a present existing fact and must not be due to a want of ordinary care on the part of the plaintiff.

2. If the plaintiff seek reformation of a writing intended to set forth a transaction based on valuable consideration, the plaintiff must establish a prior bargain upon which the parties agreed, and that by mutual mistake or mistake on the part of the plaintiff, and knowledge thereof on the part of the defendant, that writing fails to express the prior bargain.

3. If the plaintiff seek reformation of a writing intended to set forth a gift, he must show that by mistake in reducing the terms of the gift to writing, the writing fails to express the donor's intention; but in such a case the donor is the only party who may obtain this relief, since equity will not interfere to increase the gift in favour of the donee who is a mere volunteer.

4. If the plaintiff seek rescission, he must show that the parties entered into the agreement under a mutual mistake as to some matter actually contracted about ; or else that the defendant became cognizant of the plaintiff's mistake at, or prior to, the making of the agreement.

BOOK REVIEWS.

Unreported Judgments of the Bombay High Court: BY DAMODHAR GOVARDHAN DOSS, *Pleader*, Rajkote.—The idea of publishing from the printed Judgments of the Bombay High Court the unreported cases, *i. e.*, the cases not reported in the Bombay series, is a commendable one, and the publishers are to be congratulated upon their task of publishing these judgments. The 1st volume contains the unreported Judgments from the year 1869-73. There are very many useful Judgments which have not been reported and we have no doubt this will be useful to the profession. The publishers have given an index for each volume which lightens the task of reference.

The Collections of Hindu Law Texts, a Quarterly Magazine: BY J. R. GHARPURE, M. A., L.L.B., Vakil, High Court: —We owe an apology to the Editor for the delay in noticing this Magazine. We have no doubt that the publication of the authorities on Hindu Law in Sanskrit together with correct translations thereof will be useful and supply a real want. A really good publication of these authorities will lighten the task of Judges who have to administer Hindu Law. The Editor has begun with the publication of the portion of the *Yajnavalkya Smriti* which deals with *Vyavahara*. Unfortunately, however, there are very many publications of the Yajnavalkya Smrithi with the Mitakshara commentary, and a substantial portion of the Vyavahara Adhyaya has also been translated by others long ago. Mr. Gharpure therefore starts with a preliminary disadvantage in offering to the public the publication of a portion which is not, at any rate, altogether new to them. He, however, proposes to publish at the same time the Balambatti and the Subhodini which are commentaries on the Mitakshara, both of which have also been previously published. We should think that if the Editor had consolidated all these three works into one he would have done a real service to the cause of Hindu Law. Of course such a task is an extremely difficult one. However, the Editor is to be congratulated on his placing before the public a correct edition of Mitakshara, Balambatti and Subodhini together with the correct translations thereof and we trust the Magazine will prove a successful venture.

The Guardians and Wards Act: BY ALEXANDER KINNEY, Administrator-General, Bengal, Calcutta.—Mr. Kinney is already known by his commentary on the Succession Act and other works. His present commentary on the Guardians and Wards Act is in keeping with his other works. The notes are brief and all the cases are noted under their appropriate headings. In the Introduction the author gives, besides the Statement of Objects and Reasons and the legislative discussion bearing upon the Act, some definitions of *majority*, *guardian*, &c. He also gives in Part II of his Introduction an abstract and a *precis* of the provisions of the Act dealing with the powers, duties and liabilities of guardians. The rules framed by the different High Courts are given in the Appendix. We hope the book will be found useful by the members of the profession.

Acknowledgments.

We beg to acknowledge receipt of the following publications :—

Malabar Compensation for Tenants' Improvements Act I of 1900 : By A. V. Govinda Menon, B.A., B.L. Messrs. Higginbotham & Co., 1910 a Price Rs. 2.

A Digest of English Civil Law : By Edward Jenks—Book II, Part III. Torts concluded, 1910 By Messas. Butterworth & Co., 11 and 12, Bell Yard, Temple Bar, London.

The Law of Waters : By H. J. W. Conlson and W. A. Forbes. Third Edition, 1910. Messrs. Swert and Maxwel', Limited. Price 37*s*. 6*d*.

Allahabad Law Journal for	Aug. 1910
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do
Central Law Journal	Do.
Chicago Legal News	Do.
Criminal Law Journal	Do.
Green Bag	Do.
Harvard Law Review	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Magazine and Review	Do.
Law Notes	Do.
Law Students' Helper	Do.
Law Students' Journal	Do.
Michigan Law Review	Do.
Police Service Magazine	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do